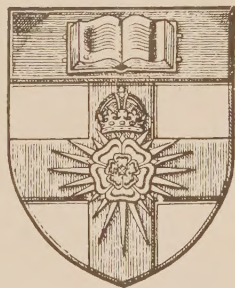


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THE LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Probate Division.

CASES DETERMINED IN THE
COURTS OF PROBATE AND DIVORCE,
IN THE
ADMIRALTY AND ECCLESIASTICAL COURTS,
AND ON APPEAL THEREFROM IN THE
PRIVY COUNCIL,
AND IN THE
COURT OF APPEAL.

EDITOR—A. P. STONE, BARRISTER-AT-LAW.

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VOL. XIII.

1888.—LI AND LII VICTORIÆ.

LONDON:

Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHANCING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.



JUDGES

OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE

LI AND LII VICTORIÆ.

The Right Hon. Sir JAMES HANNEN, Knt., President.

The Hon. Sir CHARLES PARKER BUTT, Knt.

JUDGES
OF
THE COURT OF APPEAL.
LI AND LII VICTORIÆ.

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of Court of
Appeal.

ERRATA.

<i>Page</i>	<i>Line</i>	<i>For</i>	<i>Read</i>
4	Last line	Le Brasseur & Oakley	Rivington & Son.
102	}	Daintree v. Butcher and Fasulo	Daintree and Butcher v. Fasulo.
103			
104			

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1889, will be as follows :—

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.		PAGE			PAGE
Aglaia, The		160	Daintree and Butcher <i>v.</i> Fasulo	(C. A.)	102
Aldridge <i>v.</i> Aldridge		210	D'Etchegoyen <i>v.</i> D'Etchegoyen		132
Argentino, The		61	Drew <i>v.</i> Drew		97
———, The	(C. A.)	191	Dunn <i>v.</i> Dunn	(C. A.)	91
B.			E.		
Balfour, Woodhouse <i>v.</i>		2	Erato, The		163
Baron Aberdare, The	(C. A.)	105	Essequibo, The		51
Bigwood <i>v.</i> Bigwood		89	F.		
Black, In the Goods of		5	Fasulo, Daintree and Butcher		67
Blackhall <i>v.</i> Blackhall		94	<i>v.</i> ———, ——— <i>v.</i> ———	(C. A.)	102
Bosvile <i>v.</i> Bosvile		76	Field <i>v.</i> Field		23
Bradshaw, In the Goods of		18	G.		
Bushell, In the Goods of		7	Garcia <i>v.</i> Garcia		216
Butler <i>v.</i> Butler		73	H.		
C.			Harrington, The		48
Cella, The	(C. A.)	82	Harrison <i>v.</i> Harrison	(C. A.)	180
Corbett <i>v.</i> Corbett		136			
D.					
Daintree and Butcher <i>v.</i> Fasulo		67			

	PAGE		PAGE
Heyes <i>v.</i> Heyes	11	S.	
Hyde <i>v.</i> Hyde	(C. A.) 166	Sholten, W. A., The	8
		Scrivener, Tanner <i>v.</i>	128
K.		Skinner <i>v.</i> Skinner	90
Karo, The	24		
L.		T.	
Lush, In the Goods of	20	Tanner <i>v.</i> Scrivener	128
		Taplin <i>v.</i> Taplin	100
M.		Tasmania, The	110
Moorcock, The	157	Thompson, Turner <i>v.</i>	37
Moore, In the Goods of	36	Turner <i>v.</i> Thompson	37
N.		U.	
Nares, In the Goods of	35	Ulysses, The Cargo ex	205
Niobe, The	55		
O.		V.	
Orwell, The	80	Victoria, The	125
Otway <i>v.</i> Otway	12	Vindobala, The	42
----- <i>v.</i> -----	(C. A.) 141		
P.		W.	
Palinurus, The	14	Webb, In the Goods of	71
Parisian, The	16	Wexford, The	10
Patroclus, The	54	Wilde, In the Goods of	1
Phillips <i>v.</i> Phillips	220	Wood <i>v.</i> Wood	22
Prinz Heinrich, The	31	Woodhouse <i>v.</i> Balfour	2
R.		Z.	
Read, Ex parte	221	Zeus, The	188
Rothbury, The	119		

TABLE OF CASES CITED.

A.

	PAGE
<i>A. v. B.</i>	Law Rep. 1 P. & M. 559 . . . 39, 40
<i>Akerblom v. Price</i>	7 Q. B. D. 129 . . . 161
<i>Allen v. Allen</i>	10 P. D. 187 . . . 169, 172
<i>Amalia, The</i>	Br. & L. 151 . . . 27, 29
<i>American, The, and The Syria</i>	Law Rep. 6 P. C. 127 . . . 59
<i>Anderson & Co. v. Ocean Steamship Company</i>	10 App. Cas. 107 . . . 32, 34
<i>Ardandhu, The</i>	11 P. D. 40; 12 App. Cas. 256 . . . 26, 27
<i>Astley v. Astley</i>	1 Hagg. Eccl. 714 . . . 142

B.

<i>Bancroft v. Bancroft</i>	34 L. J. (1 P. M. & Ad. 70) . . . 142
<i>Banner, Ex parte. In re Keyworth</i>	Law Rep. 9 Ch. 379 . . . 86
<i>Barker v. Highley</i>	15 C. B. (N.S.) 27 . . . 44
<i>Baylis, In the Goods of</i>	Law Rep. 1 P. & M. 21 . . . 21
<i>Bell, In the Goods of</i>	4 P. D. 85 . . . 21
<i>Bellcairn, The</i>	10 P. D. 161 . . . 26, 27
<i>Beeby v. Beeby</i>	1 Hagg. Eccl. 789 . . . 142
<i>Bengal, The</i>	Swa. 468 . . . 84
<i>Bernina, The</i>	12 P. D. 58 . . . 56, 80, 81
<i>Besant v. Wood</i>	12 Ch. D. 605 . . . 213, 214
<i>Best v. Best</i>	1 Adams, 411 . . . 143
<i>Betsey Caines, The</i>	2 Hagg. 28 . . . 193
<i>Billing v. Welch</i>	6 Ir. L. R. (C. L.) 88 . . . 137
<i>Birch v. Birch</i>	8 P. D. 163 . . . 171
<i>Black Prince, The</i>	Lush. 568 . . . 204
<i>Blake v. Blake</i>	7 P. D. 102 . . . 3, 68, 70, 102, 104
<i>Bodley v. Reynolds</i>	8 Q. B. 779 . . . 194
<i>Bold Buccleugh, The</i>	7 Moo. P. C. 267 . . . 115
<i>Boreham v. Boreham</i>	Law Rep. 1 P. & D. 77 . . . 142
<i>Bouchard, Ex parte. In re Moojen</i>	12 Ch. D. 26 . . . 86
<i>Bremmer v. Bremmer</i>	Law Rep. 1 P. & D. 254 . . . 181
<i>British Columbia Saw Mills Company v. Nettleship</i>	Law Rep. 3 C. P. 499 . . . 107
<i>Brodie v. Brodie</i>	2 Sw. & Tr. 259 . . . 133
<i>Brodribb v. Brodribb and Wall</i>	11 P. D. 66 . . . 74, 75
<i>Burrell v. Simpson</i>	4 Court Sess. Cas. 4 Series, 177 . . . 126

C.

<i>Cambefort & Co. v. Chapman</i>	19 Q. B. D. 229 . . . 84
<i>Chaldecott v. Chaldecott</i>	29 L. J. (N.S.) 699 . . . 153

	PAGE
Chambers <i>v.</i> Chambers	{ 1 Hagg. Consist. 439 . . . 142, 148, 149, 150, 151
Christina, The	{ 3 W. Rob. 27 . . . 57
Clark <i>v.</i> Clark	{ 10 P. D. 188 . . . 213
Clarence, The	{ 3 Wm. Rob. 283 . . . 63, 64, 65, 193, 194, 204
Claydon <i>v.</i> Finch	{ Law Rep. 15 Eq. 266 . . . 169
Cleadon, The	{ 14 Moo. P. C. 92 . . . 56
Columbus, The	{ 3 W. Rob. 158 . . . 10, 193, 195, 196
Concha <i>v.</i> Concha	{ 11 App. Cas. 541 . . . 17, 18
Consett, The	{ 5 P. D. 229 . . . 63, 64, 193, 199, 203
Crawford <i>v.</i> Crawford and Dilke	{ 33 W. R. 677 . . . 95
Cross <i>v.</i> Cross	{ 43 L. T. 533 . . . 181
Cumbrian, The	{ 6 Mar. L. C. 151 . . . 32

D.

Dale's Case	{ 6 Q. B. D. 376 . . . 223
Dalhousie, The	{ 1 P. D. 271, n. . . 207
Davies <i>v.</i> Davies	{ 37 L. J. (P. & M.) 17 . . . 78
Daw <i>v.</i> Eley	{ Law Rep. 7 Eq. 49 . . . 74
Dillon <i>v.</i> Dillon	{ 3 Curt. 92 . . . 149, 151
D'Oechsner <i>v.</i> Scott	{ 24 Beav. 239 . . . 182
Doddington <i>v.</i> Hallett	{ 1 Ves. Sen. 496 . . . 44, 47
Druid, The	{ 1 W. Rob. 391 . . . 56, 115, 117
Drummond <i>v.</i> Drummond	{ 30 L. J. (P. M. & D.) 177 . . . 147, 151, 152
Dugdale <i>v.</i> Dugdale	{ 38 Ch. D. 176 . . . 137
Duke of Sussex, The	{ 1 W. Rob. 274 . . . 56
Dysart <i>v.</i> Dysart	{ 1 Rob. Eccl. Rep. 106 . . . 142

E.

Eaton <i>v.</i> Eaton and Campbell	{ Law Rep. 2 P. & M. 51 . . . 137
Eliza, The	{ Lush. 536 . . . 161
Ellis <i>v.</i> Ellis	{ 8 P. D. 188 . . . 92, 93
Ellyatt <i>v.</i> Ellyatt	{ 3 Sw. & Tr. 503 . . . 153

F.

Farmer <i>v.</i> Farmer	{ 9 P. D. 245 . . . 219
Fenton <i>v.</i> Lowther	{ 1 Cox Eq. Cas. 315 . . . 169, 177
Fisher <i>v.</i> Fisher	{ 31 L. J. (P. M. & A.) 1 . . . 182
Fitzgerald <i>v.</i> Fitzgerald	{ Law Rep. 1 P. & D. 694 . . . 217, 218
Fletcher <i>v.</i> Braddick	{ 2 Bos. & Pull. (N.S.) 182 . . . 113, 117 118
Foster <i>v.</i> Foster	{ 1 Hagg. Consist. 144 . . . 142
France <i>v.</i> Gaudet	{ Law Rep. 6 Q. B. 199 . . . 194
Francis and Eliza, The	{ 2 Dods. 115 . . . 208

G.

Gardiner, In the Goods of	{ 9 P. D. 66 . . . 72
Gazelle, The	{ 2 W. Rob. 279 . . . 194, 195

	PAGE
Gertrude, The	12 P. D. 204 . . . 81
Gibbs v. Harding	Law Rep. 5 Ch. 336 . . . 213
Gill v. Gill and Hogg	33 L. J. (P. D. & A.) 43 . . . 95, 181
Gipsey King, The	2 W. Rob. 537 . . . 56
Glanvill, In re. Ellis v. Johnson	31 Ch. D. 532 . . . 169, 175
Gleaner, The	38 L. T. (N.S.) 650 . . . 194
Gorham's Case	15 Q. B. 52 . . . 223
Green v. Briggs	6 Hare, 395 . . . 44
Greer v. Young	24 Ch. D. 545 . . . 184
Grossi v. Grossi	Law Rep. 3 P. & D. 118 . . . 142, 143
Gunnestad v. Price	Law Rep. 10 Ex. 65 . . . 190

H.

Hadley v. Baxendale	9 Ex. 341 . . . 193, 194, 197
Hall v. Hall	32 L. J. (P. M. & Ad.) 117 . . . 142, 143
Halley, The	Law Rep. 2 P. C. 193 . . . 113, 116
Hammond v. Bussey	20 Q. B. D. 79 . . . 197
Harris v. Harris	2 Hagg. Consist. 376 . . . 144, 149
Harrison Ex parte	2 Rose, 76 . . . 47
Harvey v. Farnie	6 P. D. 35 & 8 App. Cas. 43 . . . 40
Heard v. Holman	19 C. B. (N.S.) 1 . . . 203
Hedwig, The	1 Spk. 19 . . . 161
Heinrich Björn, The	{ 10 P. D. 44 & 11 App. Cas. 270 . . . 84, 85, 87, 88
Helenslea, The	7 P. D. 57 . . . 9
Hoare, In re Goods of	2 S. & P. 361, n. . . . 19
Hodgkinson v. Farnie	2 C. B. (N.S.) 415 . . . 113, 118
Holt v. Holt	28 L. J. (P. & M.) 12 . . . 153, 155
Hope v. Hope	3 P. & M. 226 . . . 78
— v. —	27 L. J. (P. & M.) 43 . . . 144
Horne v. Midland Railway Company	Law Rep. 8 C. P. 131 . . . 193
Hunt v. Hunt	4 De G. F. & J. 221 . . . 213

I.

Ilott v. Genge	{ 4 Moore P. C. 265 & 3 Curt. 160 . . . 68, 70, 71, 102, 103, 104
Inca, The	Swa. 370 . . . 163
Inflexible, H.M.S., The	Swa. 200 . . . 194, 196
Inglesant v. Inglesant	Law Rep. 3 P. & M. 172 . . . 68
Irwell v. Eden	18 Q. B. D. 588 . . . 169

J.

James v. London and South Western Railway Company	{ Law Rep. 7 Ex. 187 . . . 27
Jebsen v. East and West India Dock Company	{ Law Rep. 10 C. P. 300 . . . 193
Jenkins, In the Goods of	3 Phill. Ecc. 33 . . . 19
Jones v. Corporation of Liverpool	14 Q. B. D. 890 . . . 56, 113
— v. Jones	Law Rep. 2 P. & D. 333 . . . 92
Julia, The	Lush. 224 . . . 113

K.

		PAGE
Keane, In re.	Lumley v. Desborough	Law Rep. 12 Eq. 115 . . . 181
Keats v. Keats	1 Sw. & Tr. 334	153
Khediye, The	7 App. Cas. 795	108

L.

Leete v. Leete	27 W. R. 921	181
Leicester, Lord v. Lady Leicester, cited in Foster v. Foster	1 Hagg. Consist. 144	142
Lemington, The	2 Aspinall's Maritime Cases (N.S.) 475	117
Leycester v. Logan	26 L. J. (Ch.) 306	126
Linton v. Linton	15 Q. B. D. 239	181
Lord v. Wardle	3 Bing. N. C. 680	101
Lucas v. Harris	18 Q. B. D. 127	171
Lucy v. Bishop of St. David's	1 Lord Raym. 447	221
Lyell v. Kennedy	20 Ch. D. 484	107

M.

McGregor v. McGregor	20 Q. B. D. 529	213, 215
Marshall v. Marshall	5 P. D. 19	213, 214
Maudslay v. Maudslay	2 P. D. 259	78
Medina, The	2 P. D. 5	32
Medley v. Medley	7 P. D. 122	137, 138
Milan, The	Lush. 388	29, 31
Miller v. Miller	Law Rep. 2 P. & M. 54	169, 170, 172, 175
Milne v. Milne & Fowler	Law Rep. 2 P. & M. 295	137
Morrell v. Morrell	7 P. D. 68	8
Murfett v. Smith	12 P. D. 116	101

N.

Niboyet v. Niboyet	4 P. D. 1	39, 41, 133
Nightwatch, The	Lush. 542	113
Nixon v. Roberts	1 J. & H. 739	126
Noel v. Noel	10 P. D. 179	78
Northumbria, The	Law Rep. 3 A. & E. 6	107
Notting Hill, The	9 P. D. 105	44, 63, 193, 199

O.

Oppenheim v. Oppenheim	9 P. D. 60	77
Orient, The	Law Rep. 3 P. C. 696	84
—, —	3 Mar. L. C. (O.S.) 321	116
Ottaway v. Hamilton	3 C. P. D. 393	181, 182
Ousey v. Ousey	Law Rep. 3 P. & D. 223	142

P.

Palliser v. Gurney	19 Q. B. D. 519	213
Parana, The	2 P. D. 118	63, 65, 193, 199
Parker, Dearing & Brooks, In re	54 L. J. Ch. (N.S.) 694	37

		PAGE
Parlement Belge, The	5 P. D. 197	113
Pearson v. Pearson	{ Law Rep. 2 P. & M. 451	68, 70, 102, 104
Pieve Superiore	{ Law Rep. 5 P. C. 482	84, 85, 86, 87, 88
Plating Co. v. Farquharson	17 Ch. D. 55	74
Pool v. Sacheverel	1 P. Wms. 675	74
Proctor v. Proctor	2 Hagg. Consist. 292	144, 148
Punchard, In the Goods of	Law Rep. 2 P. & M. 369	21

Q.

Quarman v. Burnett	6 M. & W. 499	59, 113, 118
----------------------------	-----------------------	--------------

R.

Raisby, The	10 P. D. 114	33, 34
Rio Grande Do Sul Steamship Company, In re	{ 5 Ch. D. 282	84
Risoluto, The	8 P. D. 109	194, 199, 203
Robertson v. Robertson	6 P. D. 119	153, 154
Robinson, In re	27 Ch. D. 160	181
Rosalie, The	1 Spinks, 188	207
Rosenberg v. Lindo	48 L. T. 478	171, 174
Rosher, In re	26 Ch. D. 801	137
Rowley v. Rowley	{ Law Rep. 1 H. L., Sc. 63	213, 214, 215
Ruby Queen, The	Lush. 266	113

S.

St. Cloud, The	1 Br. & L. 4	107
Scott v. Morley	20 Q. B. D. 120	169, 170, 177
Sedgwick v. Yedras Mining Company	W. N. May 9, 1887, 94	9
Sharp v. Powell	Law Rep. 7 C. P. 253	193
Shaw v. Ford	7 Ch. D. 669	137
Sheppard v. Bennett	Law Rep. 2 P. C. 450	223
Simonin v. Mallac	2 Sw. & Tr. 67	39, 40
Smith v. Kirby	1 Q. B. D. 131	107
— v. St. Lawrence Tow Boat Com-pany	{ Law Rep. 5 P. C. 308	56
Sottomayor v. De Barros	2 P. D. 81; 3 P. D. 1	40
Spaight v. Tedcastle	6 App. Cas. 217	59
Spence, In re	2 Ph. 247	170
Spring v. Pride	10 Jur. (N.S.) 646	186
Stanhope v. Stanhope	11 P. D. 103	92
Stanley v. Stanley	7 Ch. D. 589	173
Star of India, The	1 P. D. 466	63, 64, 193, 199, 203
Steamboat Narragansett, The	{ Olcott's Ad. Rep. 388 (New York District Court)	203
Steedman v. Poole	6 Hare, 193	186
Stormcock, The	4 Asp. Mar. L. C. 410	60
Stromless, The	1 Lowell, 153 (Massachusetts)	203
Swan, The	Law Rep. 3 Ad. & Ecc. 314	190

T.

		PAGE
Talca, The	5 P. D. 169	44
Thetis, The	3 Mar. L. C. (O.S.) 357	113
Thompson, In the Goods of	{ 4 Notes of Cases, 643	68, 70, 71
		102, 103, 104
Ticonderoga, The	Swa. 215	56, 113, 116, 117
Toulmin v. Hedley	2 C. & K. 157	101
Trent and Humber, In re, Company. }		
Ex parte Cambrian Steam Packet Company	Law Rep. 4 Ch. 112	194, 203
Twining v. Twining	3 Hagg. Consist. 72	144
Two Ellens, The	{ Law Rep. 4 P. C. 161.	84, 85, 86, 87, 88

U.

United Service, The	9 P. D. 3	113
-------------------------------	---------------------	-----

V.

Volant, The	1 W. Rob. 383	88
-----------------------	-------------------------	----

W.

Wells v. Wells	3 Sw. & Tr. 542	92, 93, 94
Westby v. Westby	2 Dr. & W. 502	213
Whiston's Case	1 Comyn's Rep. 199	223
White v. Phillips	33 L. J. (C. P.) 33	158
Wilson v. General Iron Screw Colliery }		
Company	47 L. J. (N.S.) Q. B. 239	203
—— v. Wilson	1 H. L. C. 538	213, 214
—— v. Wilson	Law Rep. 2 P. & D. 435	133
Wood v. Bell	5 E. & B. 772	194
Wright v. Sanderson	9 P. D. 149	3

Y.

Yelverton v. Yelverton	1 Sw. & Tr. 574	133
Yorkshireman, The	2 Hagg. 30, n.	194
Young, Ex parte	2 Vesey & Beames, 242	47

CASES
 DETERMINED BY THE
 PROBATE DIVORCE AND ADMIRALTY DIVISION
 OF THE
 HIGH COURT OF JUSTICE
 AND BY THE
 COURT OF APPEAL
 ON APPEAL FROM THAT DIVISION
 AND BY THE
 ECCLESIASTICAL COURTS
 LI. VICTORIÆ.

IN THE GOODS OF E. WILDE.

1887

Nov. 8.

Administration—Administration de bonis non—No Residue—Grant to Specific Legatee without Citation or Renunciation of Residuary Legatee—Practice.

Upon an application for a grant of administration de bonis non it appeared that the residuary legatee resident abroad had had notice by letter, and that he had no beneficial interest, there being actually no residue:—

Held, that the grant might be made to a specific legatee, without requiring the residuary legatee to be cited, or to renounce.

EDWARD WILDE, late of Sandyford, in the county of Stafford, died February 7, 1879, leaving a will duly executed, by which, after certain specific pecuniary legacies, he bequeathed the residue of his personal estate to Thomas Wilde, his nephew, absolutely, subject to a gift over in certain events which did not happen. He appointed two executors, one of whom renounced and the will was proved by the other, George Parrack Pritchard.

Mr. Pritchard died on January 5, 1887, intestate, leaving a portion of the estate unadministered.

A suit had been instituted in Chancery for the administration of the estate of the testator, and a personal representative being

1887
IN THE GOODS
OF WILDE.

required, application was made to Thomas Wilde, who was living at Moosimin in the North-West Territory of the Dominion of Canada. Several letters were addressed to him explaining the circumstances, and suggesting that he should renounce, and a form of renunciation was sent to him, but no answer had ever been received from him, although at the time he was in correspondence with other members of the family in this country. Under these circumstances,

Searle, moved for a grant de bonis non to Thomas Simkin Wilde, another nephew of the testator, and a specific legatee under the will, without further notice to or citation of the residuary legatee. The residuary legatee has no beneficial interest, inasmuch as according to the certificate of the Chief Clerk, while the debts and pecuniary legacies amount to £2005, the whole amount of the personal estate of the testator is not more than 1526*l*.

THE PRESIDENT made a grant to the specific legatee, Thomas Simkin Wilde, as prayed, without further citation of the residuary legatee, subject to the filing of an affidavit verifying the Chief Clerk's certificate, that after payment of the debts and legacies there would be no residue remaining.

Solicitors : *Peacock & Goddard, for Cooper & Yates, Eccleshall.*

W. L.

Dec. 1.

WOODHOUSE AND ANOTHER *v.* BALFOUR.

Will—Holograph Codicil—Attesting Witnesses unable to recollect the Execution—Presumption—Probate.

A testator left a codicil entirely in his own handwriting, written on the third side of the sheet of foolscap the first side of which contained his will. There was an attestation clause in proper form, and the testator had signed his name at the foot of the codicil, but there being no more space on the sheet the names of the attesting witnesses appeared at the bottom of the second page opposite the attestation clause.

The attesting witnesses acknowledged their signatures, but had no recollection of having signed the paper nor of ever having seen it before.

Held, that the codicil was duly executed.

EDWARD SEBASTIAN WOODHOUSE, late of 103, Victoria Street, Pimlico, and Billiter Square, London, died July 6, 1887, leaving

a will dated August 14, 1879, and a codicil dated October 3, 1883, both contained on the same foolscap sheet of paper. There was no dispute as to the will, which had been drawn up by the deceased's solicitor, and occupied the whole of the first side of the sheet of foolscap.

1887
WOODHOUSE
v.
BALFOUR.

The codicil was entirely in the deceased's handwriting, and was written on the third page of the sheet of foolscap. There was an attestation clause in due form at the end, and opposite to this, at the foot of the codicil, the deceased had signed his name. The attestation clause reached to the bottom of the page, but there was no space for any further writing, and the signatures of the two attesting witnesses appeared opposite to the attestation clause on the second page of the sheet, which was otherwise blank. Before their signatures was written the word "witness."

The codicil was propounded by the executors, one of whom was the widow of deceased, who was also residuary legatee, and the next of kin, who had appeared in the action, offered no opposition.

The attesting witnesses, Mr. Peters and Mr. Cray, were called, and while acknowledging their signatures they both stated that they had no recollection of having written them nor of ever having seen the will or codicil before. They were clerks in the employment of the deceased, and had frequently witnessed papers for him.

B. Deane, for the executors, referred to *Blake v. Blake* (1) and *Wright v. Sanderson*. (2)

THE PRESIDENT. The paper which I am asked here to admit to probate is a holograph codicil; and let us first see what the state of the testator's mind was. There is his signature at the end, and there is a regular attestation clause, "signed by the testator in the presence of us who both being present at the same time and in his presence have subscribed our names as witnesses," &c. It is perfectly clear that the man knew all about the requirements of the law as to the due execution and attestation of a will. Then there is no room for the signatures of the witnesses on that

1887
WOODHOUSE
v.
BALFOUR.

page, and accordingly, as might be expected, their signatures are found on the opposite page. Observation has been made upon the fact that their signatures are preceded by the word "witness," but it would be very natural that the word should be put there in order to connect the signatures with the attestation clause on the other side. It is a familiar principle that all things are presumed to have been rightly done unless there is reasonable ground shewn for doubting it. Why should I doubt it in this case? It is perfectly clear that the witnesses have forgotten all about the transaction. This is not the case which often occurs of men saying, "we recollect the transaction, but as far as our memory goes we did not see the testator sign." It amounts simply to this, that two persons who have often been in the habit of witnessing the deceased's signature do not recollect this particular transaction. It is a perfectly natural state of mind and quite consistent with the thing having been properly done. It is plain that the testator intended the paper to be executed in the regular way, and notwithstanding the defective memory of the two witnesses, I think it was so executed. It was not necessary that they should be told what it was they were witnessing, and I think it is clear that they did witness the codicil. I therefore admit it to probate.

Solicitors: *Le Brasseur & Oakley.*

W. L.

IN THE GOODS OF BLACK.

1887

Nov. 15.

Will—Colonial Grant—Roman-Dutch Law—Substitution of Executors—Grant of Administration with Will annexed to Administrator-General of Colony—Practice.

A testator domiciled in British Guiana by his will appointed two executors—one resident in the colony, the other in England—with power of substitution in the event of either or both being unable or unwilling to act. The executor resident in the colony administered the estate on his own behalf and on behalf of the other executor until he returned to this country to reside here permanently.

By the law of the colony an executor under such circumstances had the right to substitute as executor the Administrator-General of the colony, who thereupon became possessed of all the powers necessary for the administration of the estate. This substitution had been effected by the executor before leaving the colony, and there being estate in this country which required a personal representative here, the Court made a grant of administration with the will annexed to persons nominated as his attorneys by the Administrator-General until such time as the Administrator-General or the executor resident in this country who had not renounced should apply, and without requiring justifying security.

APPLICATION for a grant of administration with the will annexed.

Henry Marius Alexander Black, resident in and domiciled in British Guiana, by his last will, dated April 6, 1886, nominated Edward George Barr, resident in England, and John Moore, resident in British Guiana, as his executors and trustees of his infant children. In the case of either or both of them dying before him, or refusing or being unable to act, he nominated John Parry Freeman and Samuel Culpepper, both resident in British Guiana, to take his or their places as executors and trustees.

The testator was lost at sea in October, 1886, and Messrs. Barr and Moore accepted their appointments as executors, and proceeded to act therein.

By the law of British Guiana executors are allowed for a period of six months to act in administering an estate and to ascertain the nature of the trust, without committing themselves to the responsibilities of the office. Mr. Moore, while resident in British Guiana, acted as executor and as the attorney of the other executor, Mr. Barr, who was in England, and at the end of

1887
IN THE GOODS
OF BLACK.

the period of six months he continued to act as executor both on his own and Mr. Barr's behalf.

The law of British Guiana prior to July 1, 1887, provided that where a will contained a clause enabling substitution the executors had at any time a power to release themselves from their office by substituting the Administrator-General of the colony in their stead, who when so substituted had the right to exclude all other persons from and to take upon himself all the rights and duties of executor.

Prior to that date, on June 29, 1887, Mr. Moore, on leaving the colony for England, where he is now permanently resident, duly nominated according to the law of the colony the Administrator-General to act as executor of Mr. Black's estate, on his own behalf—but did not in any way affect the rights of Mr. Barr. By a law subsequently passed Mr. Barr could only substitute the Administrator-General by special leave of the Court of the colony. The Administrator-General of British Guiana dealt with the property in the colony, which was of the value of 100,000*l.*, but there being also property in England he executed a power of attorney to Messrs. C. & C. G. Champion to be his attorneys for the purpose of obtaining a grant of administration with the will annexed in this country.

An affidavit by the Attorney-General of the colony was filed setting out the law of the colony in regard to the substitution of the Administrator-General as stated above, and, further, that the Administrator-General was entitled to administer the whole estate of the testator whom he represented, wheresoever situate, and to apply for and take out letters of administration in this country, and that after he had been substituted no other person could claim administration in opposition.

Inderwick, Q.C., (*Fryer*, with him), moved that letters of administration with the will annexed be granted to Messrs. Champion & Sons as the attorneys of the Administrator-General, who by the law of the colony had now become the executor of the testator.

[*BUTT, J.*: But what becomes of Mr. Barr's rights in this country?—he has not renounced.]

Mr. Barr has not renounced, and does not desire to renounce,

but the Administrator-General has now become an efficient representative of the estate, and Mr. Barr thinks that is the best method of administering it. If the will had been proved in this country the Court would have allowed one executor to act, and of course Mr. Barr will still have the right to come in.

BUTT, J. I think the most convenient course will be to make a grant of administration with the will annexed to the attorneys for the use and benefit of the Administrator-General until such time as he or Mr. Barr shall apply. Under the circumstances I think the Court may be content with the bond of the attorneys, without requiring justifying sureties.

Solicitors: *Champion & Sons.*

W. L.

IN THE GOODS OF BUSHELL.

Nov. 29.

Will—Mistake in copying the Draft—Will altered to correspond with Draft.

A testator in the draft of his will, which was duly executed and read over to him before execution, bequeathed a legacy to the Bristol Royal Infirmary. In the will, which was not read over to him, the bequest by a mistake in the engrossment was to the British Royal Infirmary.

The Court, subject to an affidavit that there was no such institution as the British Royal Infirmary, granted probate of the will with the word "Bristol" substituted for "British."

SAMUEL H. BUSHELL, late of Worcester Park, in the county of Surrey, died June 8, 1887, leaving a will duly executed dated November 27, 1885. The will was prepared by his solicitor from his instructions, which were read over to him and fully explained, and on November 26, 1885, he executed a draft, which was also read over to him. When the engrossment of the draft was brought to him next day, he asked whether it corresponded with the draft, and being assured that it did, he did not require it to be read over to him, but executed it without further examination. Among other bequests in the will was a legacy of £5000 to the "British" Royal Infirmary, but in the executed draft the bequest was to the "Bristol" Royal Infirmary, which it appeared from the affidavits expressed his real intention.

1887

IN THE GOODS
OF BUSHELL.

B. Deane, moved for probate with the substitution of the word "Bristol" for "British." There is no reported case exactly in point, but in *Morrell v. Morrell* (1), where there was a bequest of "all my '40' shares," the Court ordered the "40" to be struck out on the jury finding that the testator intended to bequeath all his shares, which were actually 400.

BUTT, J. I see no reason why the alteration should not be made: I will grant probate with the word "Bristol" inserted instead of the word "British," on the production of an affidavit that there is no such institution as the "British" Royal Infirmary.

Solicitors: *Crowdy, Son & Tarry*.

W. L.

Nov. 30.

THE W. A. SHOLTEN.

*Practice—Writ—Address—Foreign Corporation—Order II. rr. 3, 4—
Appendix A., Forms 1, 2.*

A writ in personam for service within the jurisdiction is invalidated by the omission of the address of the defendant.

Where therefore such a writ was addressed to a foreign corporation without giving its address:—

Held, that, having regard to Order II. r. 3, the omission was material, and that the writ was invalid, and must be set aside.

MOTION on behalf of the defendants, the Netherland American Steam Navigation Company, to set aside the writ of summons and the service of the writ on Laurens Geeken and Jan Volkert Wiedsma. The writ was an ordinary writ in personam, and was addressed to the Netherland American Steam Navigation Company. No address was given of the defendants. The defendants were a Dutch company carrying on business in Holland, and the persons on whom a copy of the writ was served were respectively the sub-agent of the company in America and the managing director in Holland, who happened to be temporarily in England.

Finlay, Q.C. (*Stokes*, with him), for the defendants. This writ is invalid. The defendants are a foreign corporation, and a writ for service out of the jurisdiction cannot be issued without leave

of a judge : Order II. r. 4. Again, assuming that this is not a writ for service without the jurisdiction, it cannot be served on a foreign corporation. It is also invalid because it omits the address of the defendants, and so is not in accordance with the Forms in Appendix A. Order II. r. 3 : *Sedgwick v. Yedras Mining Co.* (1)

1887

THE W. A.
SHOLTEN.

Sir W. Phillimore (*Barnes*, with him), for the plaintiffs. It is admitted that this is not a writ for service out of the jurisdiction. It is an ordinary writ in personam, and was served on the managing director of the company in accordance with Order IX. r. 8. It is immaterial whether the company of which he is head officer is a foreign corporation. The defendants are sufficiently identified by the description in the writ, and not being resident in England it is not necessary to give their address. [He referred to *The Helenslea*. (2)]

Finlay, Q.C., in reply.

BUTT, J. The question in this case is whether the writ should be set aside. If the writ itself is not valid, it is unnecessary to consider how it was served. I have caused inquiries to be made at the Central Office, and I am informed that it is a clear rule of practice that a writ will not be issued against an individual, or a corporation, with a foreign address, without leave of a judge. I am further informed that the clerk who sealed this writ mistook part of the defendants' name for the address, and did not notice that there was no address. By the form prescribed by the orders under the Judicature Act, the address as well as the name of the defendant is a necessary part of the writ. I am quite aware that this is a writ for service not out of the jurisdiction, but within it; still it would not have been sealed if the officer of the Court had observed that there was no address of the defendant on it, or had there been the address of this foreign corporation. It is clear that the address was purposely omitted. That being so, this writ is invalid and must be set aside.

Solicitors for the plaintiffs : *Pritchard & Sons*.

Solicitors for the defendants : *Stokes, Saunders, & Stokes*.

(1) W. N. May 9, 1887, p. 94.

(2) 7 P. D. 57.

E. S. R.

1887

Nov. 22.

THE WEXFORD.

Practice—Sale of Ship.

An order will not be made for the sale of a vessel even upon the application of the owner, where such vessel is not proceeded against in the Court.

MOTION by the owners of the barque *Mary Evans* for an order for the sale of the vessel. The *Mary Evans* and the steamship *Wexford* came into collision at Santos, and the *Mary Evans* was alleged to be so seriously injured as not to be worth repairing. An action in rem had been commenced against the *Wexford*, but could not be proceeded with as the vessel was not in this country.

Barnes, for the plaintiffs. There is practically a total loss of the *Mary Evans*, and it is expedient that she should be sold under the authority of the Court, so that the defendants may not in future allege that proper measures were not taken to realize the highest sum she would fetch. This course is pointed out as the proper one in *The Columbus*. (1)

Aspinall, for the owners of the *Wexford*, was not called on.

BUTT, J. The persons who make this application are the owners of a vessel over which they have full authority, and which is not in the hands of the Court. If they desire to sell her, they can do so. The application is, in my opinion, quite unprecedented, and I dismiss it with costs.

Solicitors for plaintiffs: *Pritchard & Son*.

Solicitors for defendants: *Botterell & Roche*.

(1) 3 W. Rob. 158 (166).

E. S. R.

HEYES *v.* HEYES AND MASON.1887
Oct. 26.*Divorce—Conduct conducing to Adultery—Delay.*

In a suit by the husband for divorce on the ground of adultery, which was not defended, the husband admitted that on his wife becoming addicted to habits of intoxication he left her, after eleven years of cohabitation, broke up his home and sold his furniture with the intention of getting rid of her. He made her no allowance and never saw her until eight years after the separation, when he met her by accident. Five years after that meeting he filed the petition. The adultery was proved:—

Held, that the conduct of the husband disentitled him to a divorce, and that the petition must be dismissed.

THIS was a petition by the husband praying for a dissolution of his marriage with the respondent on the ground of her adultery with the co-respondent.

The respondent and co-respondent had not filed answers and did not appear at the hearing.

C. A. Middleton, for the petitioner.

It appeared that the marriage took place in 1863, and that the parties, who were mill hands at Accrington, Lancashire, earning each about 1*l.* a week, lived together until 1874. The petitioner in his evidence stated that shortly before that date his wife contracted habits of drinking to excess, and one night in May of that year she came home drunk and began to break the pots and the furniture. Thereupon he left the house, but returned next day and sold off all the furniture. She had then left the house, and he saw and heard nothing of her until five or six years ago, when he met her accidentally in the street. Subsequently he ascertained that she had been cohabiting with the co-respondent as his wife at Bolton for the last eight years: and this fact was proved by independent witnesses. He admitted that he had made his wife no allowance, and that when he sold his furniture and broke up his home, his object was to get rid of her. As to the delay in presenting his petition he explained it by his want of means.

BUTT, J. The adultery is established, but I shall not grant this petitioner a divorce. The first and strongest point against

1887
 HEYES
 v.
 HEYES.

him is that he himself left his wife. She did not leave him—he made no inquiries about her—and he was content to hear nothing of her for eight years. Then when he found her living with another man he said nothing—and now five or six years afterwards he comes to the Court and asks for a divorce. I do not think this case is one in which the petitioner is entitled to such a remedy, and I dismiss the petition.

Solicitors: *Chester & Co.*

W. L.

Dec. 1, 2.

OTWAY v. OTWAY.
 OTWAY v. OTWAY AND HOFFER.

Divorce—Cross-petitions by Husband and Wife—Both Parties found guilty of Adultery—Husband found Guilty of aggravated Cruelty—Judicial Separation ordered—Co-respondent not condemned in Costs.

A husband and wife in cross-petitions for dissolution of the marriage, charged each other with adultery, and the wife in addition charged her husband with cruelty. The cruelty consisted of acts of violence and an indecent assault on an infant daughter of the marriage. The wife also alleged that the husband had connived at her adultery.

The Court found both husband and wife guilty of adultery, and the husband guilty of the cruelty charged, and holding that if all relief were refused, the cruelty might be continued, pronounced a decree of judicial separation, giving the custody of the children of the marriage to the wife provisionally until the relatives could take charge of them.

On the charge of connivance the finding of the Court was in favour of the husband, but, having regard to the circumstances, the Court declined to condemn the co-respondent in costs.

In these cross-petitions, which had been consolidated by order of the Court, the husband charged his wife with adultery with the co-respondent, and the wife charged her husband with adultery, connivance, and cruelty, consisting partly of acts of actual violence, and partly of an indecent assault on her daughter aged six years.

The case was heard before the Court itself without a jury.

Bayford, Q.C. (Abrahams, with him), for the wife.

Lockwood, Q.C. (Scarlett, with him), for the husband.

Abinger, for the co-respondent.

BUTT, J., found that both husband and wife had committed adultery—that the charge of connivance had not been proved against the husband, but that he had been guilty of an act of violence against his wife, and of an indecent assault on his infant daughter, and after reviewing the evidence, proceeded to say:—

On these findings what am I to do? My first impulse was to dismiss both suits. I certainly cannot make a decree of dissolution in either. It is not usual to grant a decree of judicial separation to a wife who has been found guilty of adultery, and the question is, ought I to do it in this case? In considering this question I ask myself, taking the parties as they have appeared before the Court on the evidence, ought I to leave this wife at the mercy of this husband. One act of cruelty which I have found against the husband is a refinement of cruelty, wounding the feelings of the mother through the children, and if I refuse all relief in the case I feel that such cruelty may, and in all probability will, continue. I shall therefore make an order for judicial separation, and I am not sorry to feel that the evidence warrants me in coming to that conclusion, for, unless some such course had been taken I should lose all control over the children. The wife, on the evidence, is not quite so bad as the husband—but by how many degrees she is better it would not be easy to determine. I cannot hand them over to the father—and I do not like leaving them to the mother—but as I understand that both parties have relatives in a position of respectability, I give the custody of the children to the mother for the present, in the hope that a proposal may be made for entrusting them to a relative who will take care of them. There will be a decree of judicial separation with costs against the husband, and under the circumstances I shall not condemn the co-respondent in costs.

Solicitor for husband: *M. Abrahams.*

Solicitor for wife: *Norman.*

Solicitor for co-respondent: *S. Abrahams.*

W. L.

1887

OTWAY
v.
OTWAY.

1887

Dec. 12, 13,
14, 19.

THE PALINURUS.

Collision—Regulations for Preventing Collisions at Sea, Art. 11.

By Sir James Hannen, President:—Art. 11 of the Regulations for Preventing Collisions at Sea—which directs that a ship which is being overtaken by another shall shew from her stern to such last-mentioned ship a white light or a flare-up light—is infringed if such light is carried in any way other than is necessary to warn overtaking vessels.

Where therefore such light is so placed or carried as to be visible over part of the area of a side light it must be taken that there is a breach of art. 11.

ACTION of damage arising out of a collision between the plaintiffs' ship the *E. F. Sawyer* and the defendants' steamer the *Palinurus* in the English Channel about 5.45 A.M. on November 22, 1887.

The *E. F. Sawyer* was carrying at and before the collision, in addition to her red side light, a bright white light in a globular lantern under the taffrail, over the stern and fixed to a bracket; by the admission of the plaintiff's witnesses such light would shew from half to three-quarters of a point forward of the stern. This white light was first seen by those on the *Palinurus* half a point on her port bow at a distance of about a mile, her helm was ported slightly and her engines were put to slow, and so continued till the loom of the *E. F. Sawyer* carrying the white light appeared a-head. Immediately afterwards a dim green light was seen slightly on her port bow. The helm of the *Palinurus* was then put hard-a-port and her engines were reversed full speed astern, but the vessels came into collision, the starboard side of the *E. F. Sawyer* near the forerigging being struck by the stem of the *Palinurus*.

It was alleged by those on the *E. F. Sawyer* that they sighted the mast-head light of the *Palinurus* about three points on the starboard bow at a distance of about four miles, and that her red light subsequently came into view.

Art. 11 of the Regulations for Preventing Collisions at Sea is as follows: "A ship which is being overtaken by another shall shew from her stern to such last-mentioned ship a white light or a flare-up light."

Sir W. Phillimore, Bucknill, Q.C., and Pickford, for the plaintiffs.

1887

Sir R. Webster, A.G., Kennedy, Q.C., and Aspinall, for the defendants.

 THE
PALINURUS.

Dec. 12, 13, 14. The case was heard.

Cur. adv. vult.

Dec. 19. THE PRESIDENT. [The learned judge, after considering the evidence as to the courses of the vessels, and finding that the green light of the *E. F. Sawyer* was not a proper and sufficient light, and that therefore the *E. F. Sawyer* was to blame for the collision, proceeded as follows in regard to the exhibition of a stern light by the *E. F. Sawyer*.] A question has been discussed in this case which, in the view I take of the facts, it is not absolutely necessary to determine, but, having regard to its importance, I think it well to give my opinion, if only by way of warning for the future. It has been contended on the one side that it is contrary to the Regulations to carry a fixed stern light; on the other hand it has been argued that it is not unlawful so to do. I abstain from saying that it is contrary to the Regulations, but it is to be remembered that the object of the stern light is to warn overtaking vessels. So that if the stern light is carried in any way other than is necessary in order to give such warning, it is in my opinion an infringement of the Regulations. If, for instance, the stern light is above the taffrail so that it is visible all round, it is then misleading and illegal. Again, though it be below the taffrail, if it is visible over a greater area than is necessary for the guidance of overtaking vessels, I am of opinion that it is illegal. The range of the stern light ought never to overlap that of the side lights, and if it is a fixed light it ought to be so screened as to prevent the areas overlapping.

In the present case we have no doubt that the stern light of the *E. F. Sawyer* was visible over a portion of the area of the green, and this was calculated to mislead those on board the *Palinurus*. The white light can always be seen at a greater distance than the green, and so before the green becomes visible an approaching vessel which sees a white stern light may be led to suppose it is overtaking another vessel and to act accordingly, when in fact it

1887

THE
PALINURUS.

is approaching at a right angle. On this ground also I hold that the *E. F. Sawyer* was to blame for this collision.

Solicitors for the plaintiffs: *Rowcliffes, Rawle & Co.*

Solicitors for the defendants: *Pritchard & Sons.*

E. S. R.

Dec. 6.

THE PARISIAN.

*Practice—Reference—Cross-examination of Deponent—Order xxxvii., r. 2—
Order xxxviii., r. 28.*

Under Order xxxvii., r. 2—which enables the evidence in references in Admiralty actions to be given by affidavit—it is in the discretion of the registrar to refuse, if he thinks fit, to give weight to such evidence unless and until the deponent has been cross-examined on his affidavit, and where the deponent is a party to the action, he may, though resident abroad, be required to attend in this country for such cross-examination.

SPECIAL CASE stated by the district registrar at Liverpool. A reference had been appointed in an action, in which one Villars, who resided at Granville in France, and who was the sole owner of the vessel *La Marie*, was the plaintiff, and the owners of the steamship *Parisian* were the defendants. The order appointing the reference also directed that Villars should attend to be cross-examined on his affidavit, which had been lodged with his claim. The defendants also gave notice that they desired to cross-examine the plaintiff. After the reference had been opened the plaintiff's solicitor stated that Villars was not in attendance, and he contended that if it were desired to cross-examine him, this should be done in France under a commission. The registrar was of opinion that it was desirable that the plaintiff should be present and be cross-examined. The questions for the opinion of the Court were whether the affidavit of Villars ought to be used at the reference as he had failed to appear, and whether if he were to be cross-examined, it should be done under a commission or before the registrar.

Hall, Q.C. (Stubbs with him), for the plaintiff. In no case where an affidavit is tendered can the registrar insist on further evidence, for by Order xxxvii., r. 2, evidence at a reference may

be given by affidavit. In the present case if the plaintiff ought to be cross-examined, it should be under a commission.

1887

THE PARISIAN.

J. Walton, for the defendants. Order xxxviii., r. 28, allows a deponent to be cross-examined, and applies to Admiralty references. The registrar has a discretion in the matter: *Concha v. Concha*. (1)

Hall, Q.C., in reply.

BUTT, J. I am of opinion that the proper course in this case is for the registrar to receive the affidavit of the plaintiff in the action. But I also think that he is perfectly within his right if he refuses to give the statements in it any weight unless and until there has been a cross-examination of the deponent here or abroad. It may be doubtful whether, under the rules, the registrar has power to order the cross-examination of the plaintiff either in this country or in France. But the course I have stated is in accordance with the general practice, for the registrar may well say that he is not satisfied with the affidavit, and desires to have the evidence of the plaintiff in person. The next question is how the registrar is to exercise his discretion, whether by the issue of a commission, or the cross-examination of the plaintiff here. In my opinion there is a material difference between a party to an action and an ordinary witness. One reason of that difference is that if the deponent is resident abroad and is only a witness it may be absolutely impossible for a party to produce him, and a great injustice may be done by ordering his production here. But there is a difference when the deponent is a party, for he may come or stay away at his own peril. Another consideration to be kept in sight in exercising this discretion is the question of convenience and expense. While it may be unreasonable to require the attendance here for cross-examination of a man resident in Brazil, it may be right to compel that of a party resident in France. Here the party resides at Granville in France, there is no evidence that he is ill, and no statement on oath giving a reason why he should not come here. That being so it is perfectly within the registrar's discretion to demand that the plaintiff shall be produced for cross-examina-

(1) 11 App. Cas. 541, 558.

1887
THE PARISIAN.

tion. I may add that my decision does not, I think, conflict with the opinion of the Court of Appeal in *Concha v. Concha* (1), more especially as the House of Lords regarded the matter as one of discretion.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*

Soticitors for defendants: *Roweliffes, Rawle, & Co.*

E. S. R.

Nov. 1, 29.

IN THE GOODS OF BRADSHAW.

Administration—Grant to a Creditor—Absconding Administrator—Revocation of Grant—New Grant to Next of Kin—Practice.

A grant of administration of the estate of an intestate was made to a creditor, who, after his debt had been fully satisfied, absconded, and could not be found.

A personal representative of the estate being required in an action in the Chancery Division, the Court revoked the grant to the creditor without citing him, and made a new grant to the sole next of kin of the deceased.

CHARLES BRADSHAW, late of Fairlee, in the county of York, died February 23, 1869, intestate, leaving his widow, Ellen Bradshaw, and an only daughter, Catherine Macnab Bradshaw, his sole next of kin surviving him.

Mrs. and Miss Bradshaw did not appear when cited to take administration, and letters of administration of the deceased's estate were granted on August 15, 1869, to Nathaniel Learoyd, solicitor, of Huddersfield and London, as a creditor. Mrs. Bradshaw, the widow, died March 7, 1886, and by her death two policies of the aggregate value of 2148*l.* became payable to her trustees. Some time before her death a sum of 600*l.* had been advanced on the security of those policies, and the debt due by the estate of Charles Bradshaw to Mr. Learoyd had been discharged in full. An action having been commenced in Chancery for the administration of the trust fund—a personal representative of the estate of Charles Bradshaw was required.

Mr. Learoyd, the administrator, absconded in December, 1885. He had been summoned to attend at a Metropolitan police court on a charge of forgery, but he did not appear, and inquiries had been made for him with no result except vague reports that he had been seen in Australia and California.

Bayford, Q.C. (G. Price, with him), moved for a grant of administration with the will annexed during the absence of the person to whom the grant had been originally made.

1887

 IN THE
GOODS OF
BRADSHAW.

[THE PRESIDENT. Is there not a difficulty in proving that he has gone abroad out of the jurisdiction?]

That is so, and there is the further difficulty whether the mortgagees of the fund should be regarded as creditors, and entitled to take the grant.

THE PRESIDENT. Might not the grant to the creditor be revoked, and a grant made to somebody else, as was done in *In the Goods of Jenkins*. (1) The best course will be for the application to stand over, in order that you may consider whether you will do that.

The hearing was accordingly adjourned, and on the case being brought on again before Butt, J., on November 29,

Bayford, Q.C. (G. Price, with him), moved that the grant to Mr. Learoyd be revoked, and that a new grant be made either to the mortgagees of the policies of insurance, or to Miss Bradshaw the sole next of kin of the deceased, who was now willing to take a grant. He cited *In the Goods of Jenkins* (1), where the Court (Sir J. Nicholl) remarked that a creditor having gone away and completely settled his own debt—which was the case here—"there seems no other remedy than that the administration should be revoked, and that the executor should retract his renunciation and be allowed to take probate of the will." [He referred also to *In the Goods of H. Hoare* (2), where a grant to a creditor was similarly revoked, and a new grant made to one of the children of the deceased.]

BUTT, J. I presume it would only be a farce to advertise for the administrator under such circumstances. The right course I think will be, on the authority of the two cases cited, to revoke the grant to the administrator, and to make a new one to the deceased's sole next of kin.

Solicitors: *Rollit & Sons.*

(1) 3 Phill. Ecc. 33.

(2) 2 S. & T. 361, n.

1887

Dec. 6.

IN THE GOODS OF LUSH.

Will and Codicil—Substituted Trustee—Executor according to the Tenor.

Directions to get in the estate of the testator, and to distribute it in a certain manner after the payment of all funeral and other expenses :—

Held, sufficient to constitute a trustee an executor according to the tenor.

APPLICATION for probate of a will and codicils.

Hugh Lush, late of 211, Hatcham Terrace, New Cross, in the county of Surrey, died August 1, 1887, leaving a will and two codicils duly executed, and bearing date respectively January 24, 1882, April 15, 1887, and July 28, 1887.

By his will he appointed his wife, Kate Lush, and her two sons Uriah Lush and Hugh Lush, his trustees for certain purposes, and at the end of his will he appointed them his executors.

Some years after the execution of the will his son Uriah Lush died, and on April 15, 1887, he executed his first codicil, which commenced in these words: "In consequence of the death of my son Uriah Lush mentioned in my will as one of my trustees, I hereby appoint another trustee, and make the following alterations in the division of my property after my death: I hereby direct my trustees hereinafter mentioned to get in all my property as stated in my will." Then followed directions as to the manner in which the proceeds should be invested, and as to the sums to be paid to certain persons, and the codicil went on to direct that the trustees, "after paying all my funeral and other expenses distribute the residue and remainder of my property as stated in my will." The codicil concluded: "and I hereby appoint Kate Lush, my wife, Hugh Lush, my son, and George Boyton, of Elsie Street, Richmond Road, Middlesex, in place of my son Uriah Lush, deceased, as trustees of my codicil."

Searle, moved for probate of the will and codicils to Kate Lush and Hugh Lush, as executors named in the will, and to George Boyton as executor according to the tenor. The direction "to get in all my property," and to distribute it in a certain manner "after payment of all funeral and other expenses," sufficiently indicates that Mr. Boyton is intended to act as executor, and

there is, moreover, the statement that he is appointed in the place of Uriah Lush, who had been appointed an executor under the will. [He referred to *In the Goods of Bell* (1); *In the Goods of Punchard* (2); and *In the Goods of Baylis* (3); and Williams on Executors, 248, 8th Ed. pt. 1, bk. 3, c. 2.]

1887

 IN THE
GOODS OF
LUSH.

THE PRESIDENT. I think the reasonable construction to be put upon these words is that the testator intended that George Boyton, who was to be substituted in the place of his son Uriah, although he is only spoken of as trustee, was to be his executor. It is always a question of intention and of the construction to be placed on the instrument; and looking at the machinery which will be set in motion by the codicil, I think that the interpretation I am about to put upon it is the only reasonable one. It is plain that the trustees, including Mr. Boyton, are to get in the whole of the estate, to distribute it, and to pay some expenses besides. Supposing they do that, if it is decided that Mr. Boyton is not an executor the result would be that, having got in the estate in accordance with the directions in the codicil, he would have to hand it over to the executors, for them to hand it back again to him as a trustee. That is not a reasonable construction to put on the testator's intentions; but all is made intelligible if we assume that it was intended to substitute Mr. Boyton altogether in the place of the son to carry out these directions, which seem to me to involve the duties of an executor. I therefore direct probate to go to Mr. Boyton as executor according to the tenor, in conjunction with the executors named in the will.

Solicitors: *Gasquet & Metcalf*.

(1) 4 P. D. 85.

(2) Law Rep. 2 P. & M. 369.

(3) Law Rep. 1 P. & M. 21.

W. L.

1887

WOOD v. WOOD.

Dec. 9.*Divorce—Adultery and Desertion—Proof of Desertion insufficient—Adjournment—Supplemental Petition.*

In a suit by the wife for dissolution of the marriage on the ground of adultery coupled with desertion, the adultery was proved, but the evidence of desertion fell short of the required period of two years by several months.

The hearing was adjourned, and twelve months afterwards, the respondent not having returned to cohabitation, the petitioner filed a supplemental petition charging desertion, on proof of which the Court granted a decree nisi.

In this case the petitioner filed a petition in February, 1886, praying for a dissolution of the marriage on the ground of her husband's adultery and desertion for two years without reasonable cause.

The case was heard before the Court without a jury on June 30, 1886, and the respondent offered no defence.

It appeared that in January, 1884, the respondent left the house in which he was living with his wife and took up his residence at the business premises of his employers, who were cigarette makers, telling his wife that he was not allowed by his employer to have her there. He never afterwards lived with her, but it was proved that from October, 1884, he had lived on his employer's premises with another woman. The President found that the respondent had committed adultery, but that desertion for a period of two years was not proved, and offered either to pronounce a decree of judicial separation or to adjourn the hearing for further evidence.

The hearing was adjourned, and on August 23, 1887, the respondent filed a supplemental petition alleging adultery and desertion since October, 1884. The case was again heard before the Court without a jury, and the petitioner having given evidence that the respondent had not returned to cohabitation, a woman was called who stated that she had lived with the respondent at the cigarette manufactory since October, 1884.

Inderwick, Q.C. (Rentoul with him), for the petitioner.

THE PRESIDENT, on this additional evidence, held the desertion to be established, and pronounced a decree nisi for the dissolution of the marriage.

Solicitors: *Brighten & Lemon.*

W. L.

FIELD v. FIELD AND DENTON.

1887

Dec. 1.

Divorce—Husband's Petition—Wife possessed of Separate Estate—Application to condemn the Wife in Costs—Notice—Practice.

Where, on a husband's petition for divorce, application was made to condemn the wife, who had not appeared to defend the suit, in costs, the Court declined to entertain the application until she had received notice of it.

THIS was a petition by the husband for the dissolution of his marriage on the ground of his wife's adultery with the co-respondent. The parties were married in 1864, and there were nine children, issue of the marriage, surviving.

The respondent and co-respondent did not appear, and the adultery having been proved the Court pronounced a decree nisi with costs against the co-respondent.

Searle, for the petitioner, moved to condemn the respondent also in costs on the ground that she had separate means.

The petitioner was recalled, and in support of the application stated that the respondent at the death of her father became possessed of a considerable sum of money in her own right, which was invested in houses, bringing in a net rental of 263*l*. She had also a life interest in a fourth share of 5684*l*. consols and of three houses, amounting to 72*l*. Her total income amounted to about 335*l*. per annum.

THE PRESIDENT. The only doubt I have arises from the fact that the wife has not received any notice of this application, and I will adjourn the case until that notice has been given.

Hearing adjourned accordingly.

[On a subsequent day, notice having been given to the wife, *Moses* appeared on her behalf and read an affidavit from her stating that the petitioner's estimate of her income was inaccurate, whereupon the President made an order condemning her in costs, subject to a reference to the registrar to inquire into her means if she desired it.]

Solicitor: *G. Turner*.

W. L.

1887

THE KARO.

Nov. 30.

Damage—Collision—Actions by Shipowners and Owners of Cargo—Compromise by Shipowners—Order LII., r. 23—Limitation of Liability—Admission on Pleadings—Right of Owners of Cargo to prove for whole Amount of Damage.

The defendants' vessel came into collision with and sank another vessel carrying cargo belonging to the plaintiffs. Actions were commenced by the plaintiffs and by the owners of the carrying vessel, but in the action between the latter and the defendants' vessel, the parties filed in the registry an agreement to a decree that both vessels were to blame and for the usual reference as to the damages. The defendants then brought an action for the limitation of their liability, and paid into Court the amount of their liability under the Merchant Shipping Acts. In their statement of claim they referred to the above-mentioned agreement, and in terms admitted that the collision was "in part caused by the improper navigation of their vessel." The plaintiffs, in their defence, did not notice this admission, or otherwise refer to the cause of the collision. The usual decree was made for limitation of liability, and the staying of the plaintiffs' action:—

Held, first, that the agreement between the owners of the two vessels having been filed in the registry was, under Order LII., r. 23, equivalent to a decree of the Court, and that the owners of the carrying vessel were not entitled to have such agreement rescinded for the purpose of proving against the fund in Court for more than half the damage sustained by them. Secondly, that there was no admission on the pleadings by the plaintiffs as defendants in the limitation action which precluded them from claiming to prove against the fund for the whole amount of the damage sustained by them, and that in support of their proof an issue might be directed between them and the owners of the carrying vessel to determine whether the defendants' vessel was alone to blame for the collision.

PETITION in objection to the registrar's report.

The petitioners were the owners of part of the cargo lately laden on the *Balnacraig*. On December 5, 1886, a collision occurred between the *Karo* and the *Balnacraig*.

On December 11, 1886, an action was commenced by the owners of the *Balnacraig* against the owners of the *Karo* and her freight for damages occasioned by the collision. On December 14, 1886, an action was commenced by the master and crew of the *Balnacraig* against the owners of the *Karo* for damages in respect of the same collision. These actions were consolidated, and the owners of the *Karo* appeared as defendants therein.

On January 11, 1887, the parties to those actions came to an

agreement whereby they consented to the actions being taken out of the paper for trial, and to a decree that both vessels were to blame, and for the usual reference to the registrar and merchants. The actions were not heard, and no decree was ever made in them in Court.

1887
THE KARO.

On January 18, 1887, an action (1887. B. No. 285) was commenced by the petitioners the owners of a large part of the cargo on board the *Balnacraig*, against the *Karo* and her freight, for the whole of the damages sustained by them occasioned by the collision, and on January 25, 1887, the solicitors for the owners of the *Karo* entered an appearance in that action.

On January 31, 1887, the owners of the *Karo* commenced an action against the owners of the *Balnacraig*, and against the owners of the cargo on board her (amongst them, against the petitioners), claiming to limit their liability to the amount of 8*l.* per ton, in pursuance of the Merchant Shipping Acts, 1854 and 1862.

Appearances were duly entered on behalf of all the defendants to the said action, and pleadings were delivered, and on March 1, 1887, the usual decree was made, limiting the liability of the plaintiffs therein to an aggregate amount not exceeding 8*l.* per ton upon the tonnage of the *Karo*, or 11,708*l.*, exclusive of interest, and ordering a reference to the registrar and merchants to assess the amount in respect of which the defendants might claim against the amount of such limited liability, and staying the actions brought in respect of the said collision against the owners of the *Karo* and her freight, and among them the petitioners' action.

The owners of the *Karo* afterwards paid into Court, in pursuance of the decree, a sum of 11,819*l.* 12*s.* 6*d.*

The reference was duly held, and the registrar assessed the damages claimed by the petitioners at 17,506*l.*

The defendants other than the petitioners claimed to prove against the fund in Court only for a moiety of the damages sustained by them. The petitioners on their part claimed to prove against the fund for the whole of the damages sustained by them. This contention the defendants other than the petitioners disputed.

1887

THE KARO.

The registrar, by his report, refused to permit the petitioners to prove against the fund for more than a moiety of their assessed damages. It was of this refusal that the petitioners complained, and they submitted that they were entitled to prove against the fund in Court for the full amount of 17,506*l*.

The pleadings in the limitation action above referred to were, so far as material, as follows:—By paragraph 5 of their statement of claim the owners of the *Karo*, after reciting the agreement by consent, stated that they admitted that the said collision, and the losses and damages consequent thereon, were “in part caused by the improper navigation of the *Karo*.” The owners of the cargo on the *Balnacraig*, who delivered a separate statement of defence, did not traverse the above paragraph, and did not assert any claim to prove for the full amount of the damages sustained by them.

The agreement referred to in the above pleadings was signed by the solicitors for the plaintiffs and the defendants, and was as follows:—We the undersigned solicitors for the plaintiffs and defendants herein, hereby consent to this consolidated action being taken out of the paper for trial, and to a decree that both vessels were to blame, and for the usual reference to the registrar and merchants.” The agreement was stamped and filed in the registry.

Sir W. Phillimore, and *Stubbs*, for the petitioners. Under Order LII., r. 23, the agreement filed in the registry by the owners of the two vessels is equivalent to a decree of the Court. Such decree binds the parties to it, and accordingly the owners of the *Balnacraig* are estopped from claiming more than one half their damage against the fund in Court: *The Belcairn* (1); *The Ardandhu*. (2) But the owners of the cargo on the *Balnacraig* were not parties to this agreement, and are entitled to claim for the full amount of their damages against the fund in Court on the assumption that the *Karo* was alone to blame for the collision.

Finlay, Q.C., and *Barnes*, for the owners of the *Balnacraig*. It would be inequitable to allow the owners of the cargo to prove for the whole of their damage and not to permit the shipowners to

(1) 10 P. D. 161.

(2) 11 P. D. 40; 12 App. Cas. 256.

do the same. The owners of the cargo are, however, estopped by their pleadings in the limitation action from averring that the *Karo* was alone to blame for the collision, for they did not deny the averment that the losses were "in part" caused by the negligence of those in charge of the *Karo*. They must shew that they have a valid claim against the fund in Court. This they can only do so by the agreement filed in the action, which admits that both vessels were to blame. *The Belcairn* (1) and *The Ardandhu* (2) are distinguishable. [They also referred to *The Amalia* (3) and to *James v. London and South Western Railway Company*. (4)]

Sir W. Phillimore, in reply.

Aspinall, and *Mansfield*, were for other cargo owners on the *Balnacraig*.

Edward Pollock, for some passengers on the *Balnacraig*.

Holman, for the owners of the *Karo*.

BUTT, J. The question at present before me is whether the plaintiffs in the action No. 285, who were the owners of a certain portion of the cargo on board the *Balnacraig*, are entitled to prove against the fund for the whole, or only half of the amount of the damage they have sustained. Their goods were on board the *Balnacraig*, and were sunk with the latter in a collision with the *Karo*. The *Karo* was in fault for that collision, either wholly or in part. That is an admitted fact. The consequence of that is that on the collision so occurring, ipso facto, the plaintiffs in the action No. 285 became possessed of a maritime lien on the *Karo*, to enforce which they brought their action in due form against the *Karo*. The owners of the *Balnacraig* also commenced an action in this Court against the *Karo*; but that suit was settled by the solicitors of the plaintiffs and defendants respectively entering into the following arrangement: "We hereby consent to this consolidated action being taken out of the paper, and to a decree that both vessels were to blame, and for the usual reference to the registrar and merchants." That agreement was filed in the registry, the effect of which was to make it equivalent

1887

THE KARO.

(1) 10 P. D. 161.

(2) 11 P. D. 40; 12 App. Cas. 256.

(3) Br. & L. 151.

(4) Law Rep. 7 Ex. 187.

1887
THE KARO.
Butt, J.

to a decree of the Court, under Order LII., r. 23. Therefore the matter is to be considered as if it were the judgment of the Court pronouncing both of these vessels to blame for the collision. Shortly after that agreement had been filed the owners of the *Karo* instituted this action for the limitation of their liability, and they paid into Court 11,708*l.*, that being the amount of her statutory value at 8*l.* per ton. Upon that suit being instituted the action No. 285 was stayed. Then the only remedy of the plaintiffs in action, No. 285, was to claim against the fund in Court. Now, what is that fund in Court? It is in fact, and for all purposes of the suit, the res—the ship herself. Unless the plaintiffs in action No. 285 have precluded themselves, either by their pleadings or otherwise, from making such a claim, it appears to me clear that they have just the same rights against the fund in Court as they would have against the ship herself.

Then that leads to the inquiry whether these owners of cargo have precluded themselves from making a claim for the full amount of the damage they have sustained—that is, for the full value of the cargo they have lost—in lieu of making a claim of only one-half. It is said that they have precluded themselves from so doing by their pleadings, but I am unable to see that they have done so. In the first place, there is no distinct allegation in the pleadings of the owners of the *Karo*, in the limitation suit, that both vessels were to blame: although it is true that there was an admission that the damage and loss consequent on the collision were in part caused by the improper navigation of the *Karo*, and that they speak of a moiety of damages. What were the plaintiffs in action No. 285 to do? If they had pleaded that they were entitled to recover the whole and not the moiety, it would have been an immaterial matter in that suit. The real question in the limitation suit is whether the plaintiffs are entitled to have their liability limited, according to the terms of the statute. But then, it is said, they ought to have raised the question in the limitation action—if not by pleading, at all events by some objection. I ask why ought they to have made it, and how? For the purposes of that suit it mattered not. Their raising an allegation or asserting a claim on the hearing of that suit would not have affected the question of limitation at all. It

would not have varied the amount which the owners of the *Karo* would have to pay into Court. Then how? By asserting, I suppose, that they were going to maintain that they were entitled to prove their full value. What would have been the answer to that? "That has nothing to do with the present value. You may claim that when you get before the registrar." But when it is said that these parties, who happen to have been made parties to the limitation suit, must be precluded from obtaining full damages against the fund in Court because they have pleaded in a certain way, or have not pleaded in a certain way, or did not raise certain objections at the hearing of the limitation suit, I ask—are you to apply a similar rule to those who were not parties to the suit at all, such as those cargo owners who came in in consequence of the advertisement afterwards? It seems preposterous that those who were not present on that occasion should be admitted to prove their full damage and those who were are to be held capable of proving for only one half of the damage. It may be that the difficulty has arisen from the case of *The Amalia* (1) having decided that in the Court of Admiralty, at all events, a limitation suit might be instituted and carried to a successful issue by a shipowner without admitting his liability in the action. It would not become me now to discuss the correctness of the decision in *The Amalia* (1), but I cannot help thinking that that decision has led to a good deal of the difficulty experienced in this case.

Now, what under the circumstances is to be done? I hold that, apart from the question whether these cargo owners have precluded themselves from proving on the fund for the whole amount of their damage, they have a clear right to claim against it. I hold also that they have not so precluded themselves. It by no means follows that the whole amount of the loss they have sustained should be scheduled and annexed to the registrar's report, as a matter which they have a right to have. In my judgment, they must first establish this, that the facts of the case were such as to entitle them to whole damages, and not to half damages. If the case of *The Milan* (2) decided by Dr. Lushington in this Court is right—and I say nothing to the contrary—

(1) Br. & L. 151.

(2) Lush. 388.

1887

THE *KARO*.

Butt, J.

then it may well be on the facts of the case that they never had, and never could have had, a right to more than half of the damages. Under these circumstances some step must be taken, if they are to prove for the whole amount, to ascertain whether they are entitled. The obvious and simple way of enabling them to do it would be to remove the stay put upon their proceedings by the decree in the limitation suit, and that, if necessary, I shall do. But I do not think that is all I ought to do. As has been pointed out, they might then proceed against the *Karo*, but the owners of that vessel, having no interest in the matter, possibly would not defend the action. I think the action ought to be contested by those who have an interest in contesting it, and I think the owners of the *Balnacraig* have that interest. I shall direct an issue between the owners of the cargo in action No. 285, and any other cargo owners who like to come in, on the one side, and the owners of the *Balnacraig* on the other, to ascertain what the real state of the case is—whether each vessel is partly to blame, or whether the *Karo* was alone to blame.

I have now dealt with the position of the owners of the cargo in the action No. 285, and have held that by some means or other they are to be allowed to raise the question whether they are entitled to claim the full amount of their damages. I am asked on behalf of the owners of the *Balnacraig* to say that they are entitled to rescind what I regard as the order of the Court made in the collision suit, and to be let in to urge their claim for the whole amount notwithstanding. I am not able to see how they are to do that. I think there is at this moment what is tantamount to a judgment of the Court as between the owners of the *Karo* and the owners of the *Balnacraig*, that both these vessels were to blame. I think that by the course the owners of the *Balnacraig* have taken they have bound themselves to that, and I cannot but remark that in their pleadings in opposition to the objections to this report they allege distinctly, and as a matter of fact, that both the vessels were in fact to blame for the collision. It has been argued, on the part of the owners of the cargo, that it is immaterial whether both the vessels were to blame, or whether the *Karo* was alone to blame, because, even if both vessels were to blame, they still, as owners of cargo, would be

entitled to claim against the owners of the *Karo* the full amount of their damage. Apart from authority there would seem to be a good deal to be said in favour of that contention; but it is a matter on which it is not necessary for me to express any opinion. I hold that I am bound by the authority of *The Milan* (1), and therefore I can give no effect to that part of the contention of these owners. The result will be that I must hold that these owners of cargo are entitled to put forward their claims to the whole amount of their damage; that the owners of the *Balnacraig* are not entitled to prove for more than half the amount of their damage, and that if it be desired, there must be an issue between the owners of the cargo on the one hand and the owners of the *Balnacraig* on the other, to determine whether the *Karo* is alone to blame.

1887

THE KARO.

Butt, J.

Solicitors for owners of cargo on the *Balnacraig*: *Stokes, Saunders & Stokes*.

Solicitors for other cargo owners: *R. Greening; Toller & Sons*.

Solicitors for some passengers: *Clarkson, Greenwell & Wyles*.

Solicitor for the owners of the *Balnacraig*: *R. Greening*.

Solicitors for the owners of the *Karo*: *Downing & Holman*.

E. S. R.

THE PRINZ HEINRICH.

1888

Salvage—Agreement for particular Sum—Liability of Shipowners for Salvage of Cargo.

Jan. 18, 19.

A vessel, the value of which was 3500*l.*, and the cargo of which was worth 14,000*l.*, having been for three days on rocks in Castraes Bay, in the Gulf of Tartary, the master entered into an agreement with the salvors to pay them 200*l.* for each day of service, and a further sum of 2000*l.* in the event of the vessel being got or coming off the rocks during the continuance of the attendance of the salvors:—

Held, that the agreement was fair and reasonable and binding on the owners of the vessel.

Held, also, that the owners of the vessel were liable for the whole amount agreed upon without any deduction in respect of the salvage of the cargo.

The Raisby (10 P. D. 114) distinguished.

ACTION OF SALVAGE in respect of services rendered by the steamer *Fei Lung*, of 1180 tons register, to the steamer *Prinz*

(1) Lush. 388.

1888

THE PRINZ
HEINRICH.

Heinrich, of 872 tons register, on the 29th of June, 1886, near Castraes Bay, in the Gulf of Tartary. The value of the *Prinz Heinrich* at the time of the services was 3500*l.* and of her cargo 14,000*l.* At the time when the *Fei Lung* came to the assistance of the *Prinz Heinrich* the latter had been for three days on the rocks. An agreement was thereupon made between the masters of the two vessels whereby the master of the *Prinz Heinrich* agreed to pay 200*l.* for every day that the *Fei Lung* was in attendance, and 2000*l.* in the event of the *Prinz Heinrich* being got or coming off the rocks during the continuance of the attendance of the *Fei Lung*. The *Prinz Heinrich* came off the rocks on 30th June, and her master certified in writing that the agreement had been finished to his entire satisfaction, and at the same time gave an order for 2200*l.* on his owners. This they refused to pay, though they took a bond from the cargo-owners for their share of the above-mentioned sum. In order to avoid the arrest of their vessel the defendants, in October, 1886, agreed that the matter should be settled by arbitration in London, and deposited the sum in dispute in a bank at Hong Kong, pending the arbitration. Arbitrators were appointed, but the defendants subsequently instructed their arbitrator not to proceed with the reference.

On April 7, 1887, the plaintiffs issued the writ in this action.

Cohen, Q.C., and *Barnes*, for the plaintiffs. The salvage agreement was not made under duress. Unless such an agreement is manifestly unjust it will not be set aside: *The Medina*. (1) This agreement is not unfair. The defendants have agreed to pay a particular sum as salvage, in respect both of ship and cargo, and having entered into such a contract with the salvors they are bound by it: *Anderson & Co. v. Ocean Steam Ship Co.* (2); *The Cumbrian*. (3)

Myburgh Q.C., and *Aspinall*, for the defendants. The agreement is not binding; there is evidence that the master of the *Prinz Heinrich* was under the influence of drink, and not in a state to make a binding agreement. It is an unreasonable agreement which the Court will not uphold. The shipowner is not

(1) 2 P. D. 5.

(2) 10 App. Cas. 107.

(3) 6 Mar. L. C. 151.

liable to pay the proportion of salvage due from the cargo-owner :
The Raisby. (1)

1888

THE PRINZ
HEINRICH.

Cohen, Q.C., in reply. *The Raisby* (1) is distinguishable from this case ; there was in that case no agreement for a particular sum.

BUTT, J. (after stating the facts, proceeded.) The first question I have to decide is whether this agreement is so unreasonable and inequitable that it cannot stand. The sum absolutely secured by the agreement was only 200*l.*, for if on the evening when the service began the *Prinz Heinrich* had filled with water so that she could not have been moved, the present salvors could have recovered 200*l.* only. What, again, was the position of the vessel? She had been on the rocks for three days, two or three large pieces had gone through her bottom, and were projecting into the ship. They had gone into the water ballast tank and had forced up the top, so that the water flowed into the forehold and rose to the level of the surrounding water. In that position there was some strain from the weight of water as well as from the working of the ship. There must have been a strain on the bulkhead, and if that had given way and the next compartment had filled, it was possible that the ship also might have filled. Again, too, it is clear from the entries in the log, that the vessel was thumping on the rocks. The coast, too, was rather a barbarous one, and few, if any, ships were passing. The Elder Brethren consider that this vessel was in serious and pressing danger, and that a prudent captain would not have hesitated to have made this agreement. Therefore I hold that it is neither unreasonable nor inequitable. [The learned judge then examined the evidence as to the condition of the captain of the *Prinz Heinrich*, and found that he was sober, and was capable of understanding the effect of the agreement. He also came to the conclusion that the *Fei Lung* had towed the *Prinz Heinrich* off the rocks.] It has also been argued on behalf of the defendants that they are not liable to pay this amount, because it is one agreed on for the whole of the salvage, and that the shipowners have only to bear the same proportion as 3500*l.*, the value of the ship, bears to 14,000*l.*, the value of the cargo. To that proposition I could

1888

THE PRINZ
HEINRICH.

Butt, J.

under no circumstances assent. Even if my opinion were different, I consider that the owners of the *Prinz Heinrich* have so conducted themselves as to make themselves liable. I refer to the negotiations, the appointment of arbitrators and the deposit of the sum of 2200*l.* in a bank, all of which circumstances would tend to make the defendants now liable for the entire sum, if they were not so originally. The result has been to put the plaintiffs to rest in this matter, to lead them to believe that this claim was safe. It is wholly unreasonable to expect them, some two years after the services have been rendered, to obtain the larger part of the reward by arresting such portions of the cargo as they might chance to find after this lapse of time. But further, I am of opinion that when the captain of a ship reasonably and properly enters into an arrangement for the salvage of the ship for a particular sum he binds the shipowners to pay the agreed amount. The cargo is on board, and the shipowners need not part with it till they have obtained security for any payments which they may have to make or have made in respect of it. In this very case the shipowners took a bond from the owners of the cargo for the payment of this salvage. It is said that the case of *The Raisby* (1) is opposed to this view, but I am of opinion that it is inapplicable to the facts of the present case. In *The Raisby* (1), Sir James Hannen points out that "the so-called agreement" did not purport to extend the liability of the shipowners, and that it did not carry the matter further than if the captain of the *Raisby* had simply accepted the services of the salving ship. The distinction is thus drawn between an agreement generally to tow or to save a ship, and one for a salvage service for a particular sum. Moreover, there are dicta in *Ander-son & Co. v. Ocean Steamship Co.* (2) in favour of the view I am now expressing. Therefore I am of opinion that this ground of defence fails, and I give judgment for the amount claimed with costs.

Solicitors for plaintiffs: *Waltons, Bubbs, & Johnson.*

Solicitors for defendants: *Botterell & Roche.*

(1) 10 P. D. 114.

(2) 10 App. Cas. 107.

IN THE GOODS OF NARES.

1888

Jan. 31.

Administration—Intestacy—Indian Divorce—Grant to Next of Kin without citing former Wife.

Administration of the estate of a deceased intestate whose marriage had been dissolved by the High Court of Judicature in Bombay, granted to his next of kin without citing the divorced wife.

APPLICATION for administration to the personal estate and effects of Major Nares, who died at Tynemouth, in the county of Northumberland, intestate.

Major Nares was a domiciled Englishman, and being then an officer in Her Majesty's 17th regiment, was married at Dublin on May 13, 1876. He and his wife went to India in the same year, and cohabited together at various places in India. In March, 1884, the marriage was dissolved by a decree of the High Court of Bombay on the ground of the wife's adultery. There were no children of the marriage, and the wife, who was still surviving, had since married the co-respondent in the suit. Notice had been given to her of the application, and

Middleton, now moved on behalf of Sir George Nares, the brother and next of kin of deceased, that administration be granted to him of the personal estate of the deceased (as having died without parent, wife or child), without citation of the wife. The combined effect of 24 & 25 Vict. c. 104, s. 9, the letters patent of December 28, 1865, s. 35, and the Indian Divorce Act, No. 4 of 1869, is to give the High Court of Bombay complete power to dissolve a marriage between British subjects resident in India, professing the Christian religion, and the wife in this case therefore has ceased to have any interest in the estate of her former husband. (1)

(1) The following are the material portions of these enactments:—

24 & 25 Vict. c. 104, s. 9: "Each of the High Courts to be established under this Act shall have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial jurisdiction original

and appellate, and all such power and authority for and in relation to the administration of justice in the presidency for which it is established, as Her Majesty may by such letters patent as aforesaid grant and direct."

Letters patent of December 28, 1865, s. 35: "We do further ordain that the

1888
IN THE GOODS
OF NARES.

BUTT, J. I see no difficulty in the matter. The former wife cannot have any interest in the deceased's estate, and the grant may go to Sir G. Nares as prayed, without citing her.

Solicitors: *Neish & Howell.*

W. L.

Jan. 24.

IN THE GOODS OF MOORE.

Will—Executor intermeddling in the Estate before Probate—Writ of Summons for Injunction, and Appointment of Receiver granted on Application of co-Executor.

Where an executor had, before probate, and without the assent of his co-executor, intermeddled in the estate and made preparations to dispose of a portion of it, the Court gave leave to the co-executor to issue a writ against him claiming an injunction to restrain him from dealing with the estate before probate, and praying for the appointment of a receiver.

WILLIAM E. MOORE, late of Dunster, in the county of Somerset, died January 4, 1888, leaving a will duly executed dated December 31, 1887, by which he appointed J. C. Ker and William Aubert his executors and trustees.

The property of the deceased was of considerable value, and consisted of jewellery, precious stones, coins, &c., and a reversionary interest.

Within a few days after the death of the deceased, and before any application had been made for probate, the executor William Aubert informed his co-executor that he had deposited precious stones to the value of 1000*l.* in the National Safe Deposit Company in his own name; that he had gone through deceased's papers and destroyed some of them; and that he had made preparations for a sale of the furniture, pictures, plate, linen, &c. Mr. Ker remonstrated against his co-executor intermeddling in

said High Court of Judicature at Bombay shall have jurisdiction within the Presidency of Bombay in matters matrimonial between our subjects professing the Christian religion," &c.

Indian Divorce Act of 1869: "Nothing herein contained shall authorize

any Court to grant any relief under this Act except in cases where the petitioner professes the Christian religion and is resident in India at the time of the presentation of the petition."

the estate without his consent and before probate was granted, but without obtaining any satisfactory answer, and on January 10 he applied for leave to issue a writ of summons against William Aubert for an injunction to restrain him from dealing with the property, and for the appointment of a receiver. Robert Tunstall Moore, a residuary legatee under the will of deceased, joined in the application.

1888
IN THE GOODS
OF MOORE.

Under the Rules of the Supreme Court it is now necessary before a writ can be issued in the Probate Division to obtain the certificate of a registrar in that Division that a sufficient affidavit has been filed, but on application being made to the registrar he intimated that the course proposed was irregular and declined to certify.

Beaumont thereupon moved the Court for leave to issue the writ, and cited *In re Parker, Dearing, & Brooks* (1) as deciding that such applications must be made to the Probate Division.

THE PRESIDENT made the order as prayed.

Solicitors: *Hudson, Matthews, & Co.*

W. L.

TURNER (FALSELY CALLED THOMPSON) *v.* THOMPSON.

Petition for Declaration of Nullity—American Divorce—Domicil—Jurisdiction.

1887
Dec. 6;
1888
Jan. 24.

The petitioner, being a domiciled Englishwoman, in 1872 went through a form of marriage with an American citizen. She cohabited with him until February, 1879, in the United States, and in April, 1879, the Supreme Court of Columbia pronounced a decree dissolving the marriage on the ground of the husband's incapacity. She then returned to this country, and in 1886 presented a petition to this Court praying for a declaration of nullity of marriage:—

Held, that as the marriage was voidable and not void the petitioner had acquired an American domicil, that the American Court had jurisdiction to dissolve the marriage, and that there being no longer a marriage in existence this Court had no jurisdiction.

THIS was a petition for a declaration of nullity of marriage.

Georgiana Turner, being then a domiciled Englishwoman, went through a form of marriage at Southsea, in the county of

(1) 54 L. J. (N.S.) (Ch.) 694.

1888
TURNER
v.
THOMPSON.

Southampton, in November, 1872, with Charles Peter Thompson, a citizen of the United States and an officer in the United States navy. They cohabited together at Southsea and other places in England, and in 1873 they went to the United States, where they continued to reside, the respondent being occasionally absent on his professional duties, but always returning and cohabiting with the petitioner in the intervals between his services afloat. In February, 1879, the petitioner presented a petition to the Supreme Court of Columbia praying for the dissolution of the marriage on the ground of the respondent's incurable incapacity, and in April, 1879, the Court pronounced a decree dissolving the marriage. The petitioner returned to this country, where she has ever since resided, and desiring to marry again, but being advised that there were doubts as to the validity in this country of the decree of the American Court, she presented a petition to this Court in September, 1886, praying for a declaration of the nullity of her marriage with the respondent.

The respondent did not appear, and on the hearing of the petition before Butt, J., in August, 1887, he held that the Court had no jurisdiction, and directed that the papers should be forwarded to the Queen's Proctor in order that the question of jurisdiction might be argued.

The matter now came on for argument before the President, and a doubt having been raised whether 23 & 24 Vict. c. 104, ss. 5, 7, and 36 Vict. c. 31, applied to such a case as this, it was arranged after some discussion that the Attorney-General should formally file a plea demurring to the petitioner's pleas in the petition.

Sir R. Webster, A.G. (Middleton with him), for the Queen's Proctor. The marriage having been already dissolved by a competent Court there is now no marriage which this Court has jurisdiction to dissolve. It is immaterial that the ground of dissolution was nullity, because in the United States the jurisdiction is not founded on the ecclesiastical law, and a decree of dissolution and not a declaration of nullity is the form in which the marriage is put an end to. The respondent never lost his American domicil, he went through a proper form of marriage in

this country, and the proceedings in America were properly instituted. It follows that the decree pronounced by the tribunal of the territory in which the parties were domiciled at the commencement of the suit is binding everywhere. No doubt where parties come into the court of the country in which the contract had been made, as in *Simonin v. Mallac* (1), and ask whether their marriage is a good one, the Court has a right to entertain the question; but that does not affect the question whether the competent Court of the domicile has not power to inquire into the validity of the marriage. Here both parties continued to retain their American domicile, and the decree of the American Court therefore completely dissolved the marriage.

Bargrave Deane, for the petitioner. The forum of the contract is the only one in which the question of the validity of this marriage can be tested. To make the Court of the domicile the Court of jurisdiction is to assume that this marriage was valid—because unless it were the wife could not obtain the domicile of her husband. Capacity is a necessary ingredient of the contract. Without capacity there can be no valid marriage, consequently the petitioner never lost her English domicile, and the United States Court was not a competent forum to determine her position. The judgment of James, L.J., in *Niboyet v. Niboyet* (2), is an authority for holding that the wife's domicile is not to be assumed to be the husband's where there is a suit for nullity, and the decree of the American Court, though it might be binding against the husband in the United States, would not operate as a relief to her in this country.

Sir R. Webster, A.G., in reply. There is no authority for contending that incapacity makes a marriage void ab initio—where no complaint has been made by either of the parties. On the contrary, *A. v. B.* (3) is authority for holding that there must be complaint made, and that impotence only makes a marriage voidable not void. If the lady had been content to live with her husband it would have been a perfectly good marriage for all the purposes of property, domicile, &c.

[In the course of the argument on both sides, the following cases

(1) 2 Sw. & Tr. 67.

(2) 4 P. D. 1.

(3) Law Rep. 1 P. & M. 559.

1888

TURNER
v.
THOMPSON,

1888

TURNER
v.
THOMPSON.

were referred to: *Simonin v. Mallac* (1); *Niboyet v. Niboyet* (2); *Sottomayor v. De Barros* (3); *Harvey v. Farnie* (4); *A. v. B.* (5)]

Cur. adv. vult.

THE PRESIDENT. The facts of this case are as follows: The petitioner, Georgiana Turner, was a British subject, domiciled in England, and, on November 7, 1872, she married, in England, the respondent, who is a citizen of the United States, domiciled there. He was in the United States marine service, and he was from time to time engaged professionally away from his wife; but they met and cohabited together at various places in the United States and elsewhere. In 1879 she instituted proceedings in the United States for a decree dissolving the marriage on the ground of her husband's incompetency; the form of decree in the United States being a dissolution of marriage, and not, as in this country, a declaration that the marriage was null and void. That is a mere difference in form. The marriage was accordingly dissolved, and she has now returned to England to institute proceedings here for the purpose of having her marriage declared null and void. The case came before my brother Butt, and he raised the question whether there was anything on which this Court could proceed, and whether this Court has any jurisdiction, because, of course, if the marriage were absolutely dissolved by the Court in the United States, then there exists no marriage between the parties upon which this Court can be called on to pronounce an opinion. Mr. Justice Butt ordered the case to be argued by the Queen's Proctor, and it now comes before me.

I am of opinion that this Court has no jurisdiction, in the sense I have already mentioned; that is, that the marriage was totally and absolutely dissolved by the decree of the Court in the United States; and therefore that there is no marriage between the parties, which could be dissolved or declared null and void by this Court.

The marriage, though it took place in England, must, no doubt, according to the decision in *Harvey v. Farnie* (6), which went up to the House of Lords, be taken to be *primâ facie* an

(1) 2 Sw. & Tr. 67.

(2) 3 P. D. 52; 4 P. D. 1.

(3) 2 P. D. 81; 3 P. D. 1.

(4) 6 P. D. 35; 8 App. Cas. 43.

(5) Law Rep. 1 P. & M. 559.

(6) 8 App. Cas. 43.

American marriage, because the husband was domiciled in the United States, and, *primâ facie*, the Courts of the place of his domicile had jurisdiction in the matter. If the parties had remained in England, then, under some circumstances, the case of *Niboyet v. Niboyet* (1) is an authority for saying that the Courts of this country would have jurisdiction. But, as a matter of fact, these parties after the solemnization of the marriage went to the United States and there took up their permanent abode. I am of opinion that the wife did completely acquire a domicile in the United States. I know it is alleged on her behalf that that is not so. It is said she was by origin a British subject, and as by the law of England the matter in dispute between her and her husband would have been disposed of in the form of a declaration that the marriage was null, she therefore was entitled to treat the marriage as null and void from the beginning, so that she never lost her English domicile at all. The fallacy which underlies that argument appears to me to be evident from this. A woman when she marries a man, not only by construction of law, but absolutely as a matter of fact, does acquire the domicile of her husband if she lives with him in the country of his domicile. There is no ground here for contending that she did not take up that domicile. She had the intention of taking up her permanent abode with him, and of making his country her permanent home. It is to be remembered that a marriage by the law of England, when one of the parties is incompetent, is not a marriage absolutely void, but only voidable at the instance of the injured party. If she had thought fit she might have remained a wife, enjoying all the advantages of a wife, save that of marital intercourse. It was only in 1879, the marriage having taken place in 1872, that she instituted proceedings for getting that marriage put aside.

I am of opinion that at the time of the institution of that suit, which is the turning point of the proceeding, her domicile was, in fact and in law, in the United States; therefore the United States Courts had jurisdiction in the matter, and upon this ground I think the petition must be dismissed.

Queen's Proctor.

Solicitor for petitioner: *S. H. Turner.*

(1) 3 P. D. 52.

W. L.

1887

THE VINDOBALA.

Dec. 19, 20.

Ship — Co-owners — Arrest of chartered Ship — Damages — Sale — Liability of Purchaser — Liability of Trading Owners.

In an action of restraint it appeared that the plaintiffs, a minority of the co-owners, had given notice to the managing owner that they declined to be bound by any new charterparty. The managing owner, who had been appointed manager with the sanction of the plaintiffs, had on the day when the above notice was given to him concluded an arrangement for a charterparty, and had himself signed the charterparty, though it was not signed by the charterers till some days afterwards :—

Held, that the charterparty was binding on the plaintiffs.

A purchaser of shares in a ship, which at the time of the sale is on a voyage, is liable for the expenses of this voyage, and of the vessel's outfit for it, and is entitled to a share of the freight.

Part owners who do not dissent from the employment of a ship, and are aware that other part owners have dissented, are liable to bear the expenses, and are entitled to receive the profits of the ship in the proportion which their shares bear to the number of shares in the ship, after the deduction of the shares of the dissentient part owners.

PETITION in objection to the Registrar's report. The plaintiffs were E. J. and C. H. Walker, executors of one R. Dickinson, who from 1882 until his death on September 9, 1884, was the managing owner of the *Vindobala*. E. J. Walker was the managing owner of the *Vindobala* from September 9, 1884, at first as executor of R. Dickinson and then by election by a majority of shareholders present at a meeting held on October 21, 1884. The plaintiffs claimed from the owners of certain shares in the *Vindobala* moneys due to them as managing owners. A special case was stated for the opinion of the Court, which was referred to the registrar and merchants by Butt, J., to report on the accounts and facts therein stated. It was to this report that the several defendants pleaded in objection.

The facts, so far as they are material to the points decided, were, that from the date of Dickinson's appointment to July 19, 1884, he was trading with the ship on behalf of and as agent for all the owners. On July 12, 1884, negotiations began in reference to the chartering of the *Vindobala* by merchants in Amsterdam. On July 14 the shipowner's agent at Amsterdam telegraphed that

the ship was "fixed." On July 17 the charter, which had been drawn out in blank and signed by Dickinson's agents in London and sent to Amsterdam on July 12, was confirmed by them by telegram. On July 19 some of the defendants, called in the proceedings the Bell defendants, being owners of 14/64ths of the *Vindobala*, through their solicitors, gave notice to the managing owner that they declined to continue sailing the *Vindobala*, or to be in any way bound by any new charterparty, and asked for a bond for the safe return of the vessel if she was continued in use. On July 22 a fresh charterparty, containing some slight differences from that sent from England, was signed by Dickinson, having been signed previously by the charterers in Amsterdam. On July 28 a charterparty, supplementary to that already mentioned, was entered into in order to enable the *Vindobala* to be employed on her outward voyage, viz., by taking a cargo of coals from the Tyne; on August 3 the vessel arrived in the Tyne and began to load the cargo of coals. On August 5 the Bell defendants issued a writ against the *Vindobala* in an action of restraint, and she was arrested on the same day when ready for sea. On August 8 one Bourne, another of the owners of the *Vindobala*, gave notice that he would not join in sailing her. The charter of July 17 was ultimately cancelled on September 18, without payment of any damages to the charterer, but the brokerage on the charterparty being paid. On October 26 the coals on board took fire, and the cargo had to be discharged. On December 19 bail for security was given in respect of the shares of the owners who had arrested the *Vindobala*. She was released and sailed under a charterparty.

On July 17, 1885, the shares in the *Vindobala*, twenty in number, held by the executors of Dickinson were sold, and ultimately came into the hands of one Leslie, who took them with all liabilities and advantages incident to them on July 17, 1885, at which time the *Vindobala* was engaged on a voyage termed in the case voyage No. 18.

The registrar found that the charterparty of July 17 was binding on all the owners, and that the Bell defendants were therefore not justified in arresting the vessel on August 5, and in interfering with the charterparty of July 17, and with that supplementary

1887

 THE
VINDOBALA.

1887
THE
VINDOBALA.

thereto, and were liable for losses and expenses caused by that act. As Bourne did not give his notice till a later period, and did not join in arresting the vessel, he was not so liable. The registrar further held that Leslie was entitled to 20/64ths of the freight of voyage No. 18, and to pay 20/64ths of the expenses of earning it. He further decided that the remaining, or Craven owners, as they were called, were entitled after the release of the *Vindobala* to receive freight, and liable to pay the expenses of the several voyages in 43rds and not 64ths of the *Vindobala*: they having contended that they were only liable in 64ths, as they had not, though acquiescing in the sailing of the *Vindobala*, and knowing that certain shareholders were not participating in the voyages, agreed to increase their liability to a larger proportion than 64ths.

Sir W. Phillimore, and *Barnes*, for the Bell defendants. These defendants should not have been held liable for damages caused by the arrest of the *Vindobala*, for the Amsterdam charterparty was not actually effected at the time of the notice on July 19, and also the plaintiffs might have given bail.

[They referred to *The Notting Hill* (1) in reference to damages in case the charterparty was binding at the time of notice.]

Carver, for the plaintiffs. On July 19 there was a binding contract of charterparty. The managing owners were not bound to go to expense in finding bail: *Barker v. Highley*. (2) The Bell defendants are therefore liable for all the consequences caused by the arrest of the *Vindobala*.

Bourne ought to have been held to be a contributory to voyage 15. Leslie is liable for the expenses of voyage No. 18, the voyage must be taken as a whole, and a partner in the adventure coming in it during such voyage is liable for all the expenses of it: *Green v. Briggs* (3); *Doddington v. Hallett*. (4)

[In reference to the arrest of the *Vindobala* when under charter he referred to *The Talca*. (5)]

Bruce, Q.C., J. Walton, and *Simey*, for the Craven defendants. These defendants are only liable in the proportion of 64ths, and not 43rds or 47ths, in respect of the expenses of the ship after

(1) 9 P. D. 105.

(3) 6 Hare, 395.

(2) 15 C. B. (N.S.) 27.

(4) 1 Ves. Sen. 496.

(5) 5 P. D. 169.

the Bell defendants gave notice that they would not join in the adventure. The withdrawal of some of the co-owners from the risks does not make the remaining owners liable for a larger share of expenses than the proportion of their shares bears to the whole 64ths of the ship.

Aspinall, for Leslie. Leslie is not liable for any expenditure incurred before the date at which he became an owner in the vessel.

1887

THE
VINDOBALA.*Cur. adv. vult.*

1888. Jan. 17. BUTT, J. This is an action between the co-owners of the *Vindobala*. A special case was stated for the opinion of the Court at very considerable length, and the facts were somewhat involved. It appeared to me that it was impossible to ascertain what the precise questions for the determination of the Court were, until the accounts of a number of voyages which the ship had made should have been taken. I therefore made an order referring the matter to the registrar. He has now made his report on the facts, and the accounts of the vessel have been taken. In the report several matters of principle and law are involved, and it is with these I shall proceed to deal, assuming the facts as they appear in the case and in the report.

The first question is this: whether certain persons, known throughout this case as the Bell defendants, were bound by the terms of a charterparty, dated July 17, 1884, and entered into by the managing owner, Mr. Dickinson, on behalf of all concerned. It was alleged by the Bell defendants that before that charter was actually signed, they, on July 19, gave notice to the managing owner that they declined to continue the sailing of the vessel, or to be bound by any new charterparty. By the 19th, and possibly before, the charter in question had been signed by the managing owner, but not by the charterers. The contract of charter had, however, been concluded subject to certain minor questions, and in my judgment Mr. Dickinson could not honourably have withdrawn from it. In the words of the brokers, "the ship was fixed." I hold, therefore, that the Bell defendants having empowered Mr. Dickinson to contract for them, are therefore bound by the charter of July 17th as well as by the supplementary charter of

1887

THE
VINDOBALA.

Butt, J.

July 28, by which it is admitted they would be bound if they were bound by the earlier one. It follows from what I have just said that the Bell defendants had no right to arrest the *Vindobala* as they did, and are liable for any damages resulting from their wrongful act. I am of opinion that the registrar has exercised a reasonable and proper discretion in holding them liable for the loss up to September 3 and no later. (1) As regards Bourne I think that the registrar was right in holding that he was a non-trading owner in respect of voyage 15, having regard to the date at which his notice was given to the managing owner.

The position of the defendant Leslie has next to be considered, and the first question in regard to him is this: The voyage was in course of prosecution when he purchased his shares. It is contended on the one side that he is not liable to pay a share of the cost of the outfit of and preparation for that voyage; on the other that the proper principle by which to ascertain the position of a shareholder who purchases after the commencement of a voyage is to state the accounts—to charge him with his share of the expenditure incurred from the outset of it, and to credit him with his share of the profits. The registrar has debited Mr. Leslie with his share of the expenditure of the voyage, and credited him with his share of the freight, and in my opinion he was right in

(1) The following is the passage in the report which is here confirmed by Butt, J. "The next question is what is the limit of that liability. This would seem to depend on what new duty was cast on the managing owner by the arrest. We have considered that his best course would have been to consult the non-arresting owners, and with their concurrence, if they would not bail the ship, to adopt with reasonable promptitude some other course, which would minimise the loss and expense, such as to negotiate the cancellation of the charters, and failing in that to abandon them, throwing on the arresting owners in either case any loss that might ensue. Such a course we think, allowing time for negotiations and communications, might

have been decided upon by September 3, on which day the greater part of the crew were in fact discharged. We hold, therefore, that the arresting owners are liable for all losses and expenses consequent on the arrest, which would have been incurred if those charters had been abandoned by that date, and that any other losses so resulting and subsequently incurred, other than the costs of the custody of the ship by the marshal during arrest, should be borne by all the owners. In deciding, however, that the arresting owners are liable for losses as above stated, I am of opinion that such losses should not include damages, or in other words, demurrage of the ship."

so doing. It is a question which has been more than once discussed, and with reference to which there does not appear always to have been entire unanimity of opinion. In *Doddington v. Hallett* (1) Lord Hardwicke had under consideration the question of how accounts of voyages were affected by the insolvency of one of several co-owners, and he observed that the Court would never extend a partnership of this kind so as to affect purchasers beyond what the course of trade would do, which must govern in mercantile matters. This authority was questioned and dissented from by Lord Eldon in *Ex parte Harrison* (2) and *Ex parte Young*. (3) But it is material to note how Lord Tenterden in his well-known work deals with Lord Hardwicke's judgment. "This usage or course of trade," he says, "I apprehend to be to charge the assignee or purchaser in account for the outfit and other expenses incurred in respect of the voyage, of which he is entitled, in consequence of his purchase, to share the profits, which can be only the voyage in prosecution at the time of the purchase, but not to carry back the charge as against him to the expense of any antecedent adventure, from which he can derive no profit." (4) This passage seems to me to be an accurate exposition of the law, and I therefore uphold the registrar's decision on this point. A question has been raised also with regard to Leslie as to his liability to pay certain calls in one or more insurance clubs, but I can find no evidence to fix him with any such liability.

I now come to the question as to certain other co-owners known as the Craven defendants, who were not among the dissentient shareholders. They contended that the registrar was wrong in making them liable in proportions other than 64ths. But they had notice and were perfectly well aware that certain co-owners had disclaimed any part in the expenditure of the voyages subsequent to the notice of July 19, 1884, and the arrest of the *Vindobala* which followed it. They allowed the ship to be sailed, and to be sent on these voyages. Therefore I have no hesitation in upholding the registrar's judgment on this point also, to the effect that each of the Craven defendants must pay his quota

1887

THE
VINDOBALA.
Butt, J.

(1) 1 Ves. Sen. 496.

(3) 2 Vesey & Beames, 242.

(2) 2 Rose, 76.

(4) Abbotton Shipping, 12th ed. p. 66.

1887

THE
VINDOBALA.

of the total expenses, that is, in other words, that they are liable in 43rds and 47ths, and not in 64ths. I have now dealt with the main points which have been raised. I agree with the view which the registrar has taken, and I confirm the report.

Solicitors for plaintiffs: *Williamson, Hill, & Co.*

Solicitors for Bell defendants: *T. Cooper & Co.*

Solicitors for Craven defendants: *Hickin & Fox.*

Solicitors for defendant Leslie: *T. Cooper & Co.*

E. S. R.

1888

Feb. 7, 14.

THE HARRINGTON.

Wreck—Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii), s. 86.

In ascertaining the charges and expenses of weighing or raising a vessel under the Thames Conservancy Act, 1857, s. 86, the cost of a special apparatus provided by the Conservators for removing wrecks, and used on the particular occasion, may be taken into account; such cost comprising interest upon capital invested in the apparatus, repairs, a depreciation fund, and the insurance of the apparatus against risk. The charge for insurance of the apparatus cannot be estimated by reference to the tonnage of the wreck raised by it. Where it appears that the work in question could have been done more cheaply by a less expensive apparatus, the charges must be based on the lower rate.

PETITION in objection to the registrar's report. The action was brought by the Conservators of the Thames to recover from the owners of the *Harrington* the balance of the charges and expenses of raising the vessel, which had been sunk in the Thames. The defendants admitted their liability, and the action was transferred for the purposes of the investigation of the plaintiffs' claim to the Probate, Divorce, and Admiralty Division. The plaintiffs made their claim under the Thames Conservancy Act, 1857, s. 86 (1), and the question raised at the hearing of the petition in objection to the report, was as to the proper manner

(1) 20 & 21 Vict. c. cxlvii., s. 86 :
"When and so often as any vessel shall be sunk or stranded in the river, it shall be lawful for the Conservators . . . to cause any such vessel to be weighed and raised . . . and to cause the same . . . to be sold by public auction or otherwise, and by or out of the proceeds of such sale to pay the

charges and expenses of weighing and raising such vessel . . . and in case the proceeds of such sale shall be insufficient to defray the charges and expenses of weighing and raising such vessel . . . the deficiency shall be paid to the Conservators by the master or owner on demand."

of estimating "the charges and expenses" mentioned in that section.

1888

 THE
HARRINGTON.

The case being reported on account of the principles laid down by the President, it is unnecessary to state the evidence taken before the registrar.

Sir W. Phillimore, and *Bankes*, for the defendants.

Barnes, and *Holman*, for the plaintiffs.

Cur. adv. vult.

Feb. 14. THE PRESIDENT. The question in this case is, in what way the charges and expenses mentioned in s. 86 of the Thames Conservancy Act, 1857, are to be estimated. It is clear that the Conservators may, if they think fit, employ independent contractors to raise a wreck. If they do so, the charges which they pay for raising or getting the wreck out of the way would be recoverable against the owners, if the wreck itself were not of sufficient value to defray such expenses. But the Conservators have not adopted the plan of employing other persons. They have provided themselves with very expensive and undoubtedly very efficient apparatus of various kinds for the purpose of ridding the river of wrecks. They have thus, no doubt, destroyed the market, so to speak, for the use of apparatus belonging to other persons.

The Conservators contend, and contend rightly, that the cost to which they have been put in providing this apparatus—that is to say the interest on the capital invested in it—must be taken into account in estimating the charges and expenses incurred in raising a particular wreck. They further contend, and rightly, that the cost of repairs to that apparatus, that a depreciation fund, and lastly, the insurance of the apparatus against risk whilst doing work, must be taken into account. As regards the insurance the Conservators have charged at the rate of 3s. per ton on the tonnage of the wreck. The registrar has rightly rejected that mode of computation. For there is no true relation between the tonnage of the wreck and the insurance of the plant engaged in raising it. The danger to the plant depends on an infinite variety of circumstances quite unconnected with the tonnage of the wreck. Thus no risk may be run in the case of



1888

THE
HARRINGTON.

Sir J. Hannen.

a large vessel, but there may be great risk in the case of a small one. I am of opinion that the insurance must be included in the charge which is made for the use of the particular apparatus. With regard to that charge the registrar states that the amount allowed has been arrived at bearing in mind this method of allowing for the insurance of the plant.

As regards the other points raised the registrar states, and in my opinion correctly, that no definite principle upon which the charge for the use of the apparatus was based was laid before him. An attempt was made on the hearing of these objections to the report, to supply what had been omitted before the registrar, and the published accounts for three years of the Thames Conservancy were laid before me. But they are wholly insufficient to enable me to say that these rates are fixed on a reasonable basis. Three years is not a sufficiently long period for the purpose. For example, one of these lighters has been in existence for twenty years, which shews how much longer a period than three years is required to make a proper estimate of the amount to be charged. The charge in any case on the owner of a wreck is an onerous one, especially when a man has lost his property by the negligence of another, and has to bear all the expense of raising the wreck for the benefit of shipowners in general. Therefore I must not allow the burden to be greater than is absolutely necessary. I think also that it would be unreasonable to send this case back to the registrar for the Conservators to make out a better case than they did on the previous inquiry, unless it is clear that the registrar and merchants have proceeded on a wrong principle in arriving at their conclusions. I do not think that they have done so, and I am unable to say from the evidence that they have deducted too large an amount from the Conservators' claim.

I have already intimated that the Conservators are entitled to make reasonable charges under the heads I previously stated. But they must be considered in relation to the particular case. Thus if a very expensive apparatus were used, yet if the work could be done with less expensive plant, the charges should be based on the less expensive rate.

Again in this particular case the apparatus was taken away

for a time and used for the purpose of raising another wreck, which occasioned some delay in connection with the raising of the wreck of the *Harrington*. The registrar rightly decided that that delay must diminish the amount which was charged in the present case.

1888

THE
HARRINGTON.

Sir J. Hannen.

Again, I am of opinion that the losses incurred by the Conservators through being unable to obtain payment from the owners of some wrecks are not to be taken into account, otherwise the owners of the *Harrington*, for example, would pay for raising other wrecks. I therefore affirm the report, except as regards the costs, which the registrar is now of opinion should be borne entirely by the owners of the *Harrington*, the Conservators having recovered a substantial sum.

Solicitors for plaintiffs: *Elmslie, Forsyth, & Elmslie*.

Solicitors for defendants: *Donning & Holman*.

E. S. R.

THE ESSEQUIBO.

Feb. 9.

Collision—Regulations for Preventing Collisions at Sea, Art. 11.

By art. 11 a ship which is being overtaken by another shall shew from her stern to such last-mentioned ship a white light or a flare-up light :—

Held, that such light must be shewn not once and for a short time only, but from time to time while the ship is “being overtaken” within the meaning of the article.

ACTION OF DAMAGE in which the owners of cargo lately laden on the barque *Hoffnung* were plaintiffs, and the owners of the steamship *Essequibo* were defendants. The *Hoffnung* was on October 8, 1887, about 9 P.M., in the English Channel, twenty-five miles S.S.E. of the Start Point, making about a knot an hour, and heading E. by N. The weather was overcast and dark, with a light air from the S.S.E. The *Essequibo* was at the above-mentioned time proceeding up Channel at the rate of eight-and-a-half knots an hour on a course S. 80° E. true.

From the evidence of the plaintiffs’ witnesses it appeared that those on the *Hoffnung* saw the mast-head light of the *Essequibo* bearing about two points on the port quarter, distant from two to two-and-a-half miles. Shortly after the green light of the *Essequibo*

1888

 THE
 ESSEQUIBO.

came into view, and the master of the *Hoffnung*, judging that the *Essequibo* was heading for and overtaking him, ordered a flare-up light to be shewn from the stern of his vessel. The time during which the light was exhibited did not exceed two minutes, and no further light was shewn, the master of the *Hoffnung* believing that the *Essequibo* had acted for the light. The *Essequibo*, however, overhauled the *Hoffnung*, and when about a cable's length off on her port side, apparently acting under a port helm, came into collision with the *Hoffnung*, striking her with her stem abaft the main rigging, and causing her to sink immediately. The collision occurred about ten minutes after the exhibition of the flare-up light. According to the log of the *Essequibo* a light was seen by those on board at the time above given.

No evidence was called by the defendants.

Sir W. Phillimore, and *Stubbs*, for the plaintiffs. The *Hoffnung* was an overtaken ship within the meaning of art. 11 (1), and complied with the duty cast on her by that article by exhibiting a flare-up light when and for the time she did. The *Essequibo* therefore is alone to blame for this collision, for not keeping out of the way.

Bucknill, *Q.C.*, and *Barnes*, for the plaintiffs. The plaintiffs' vessel is to blame. There was no sufficient compliance with art. 11. The vessel being overtaken must continue to shew a light until she has been overtaken, and until her side lights can be seen. During the last mile, before overtaking the *Hoffnung*, the *Essequibo* had no warning of her presence.

Sir W. Phillimore, in reply.

THE PRESIDENT. As no witnesses have been called on behalf of the defendants' vessel, the statements made by the plaintiffs' witnesses must be accepted. I consider that they establish that a flare-up light of some kind was exhibited nine or ten minutes before the collision. It may be doubtful whether it was an effective flare-up, for it does not seem to have been used for some six or seven months previously. It appears that the whole exhibition

(1) Art. 11. "A ship which is being overtaken by another shall shew from her stern to such last-mentioned ship a white light or a flare-up light."

of the light lasted for two minutes, which were, as I have said, nine or ten minutes before the collision occurred. During the whole of this space of time the *Essequibo* was an overtaking vessel.

1888

THE
ESSEQUIBO.

A simple but very important practical question remains to be determined, viz., whether the exhibition of the flare-up light as and for the length of time it took place in this case discharges the overtaken vessel from the duty of again exhibiting it. For I take it that the light mentioned in the official log of the *Essequibo* was that exhibited by the *Hoffnung*. I am of opinion that one short exhibition is not sufficient for the safety of vessels, but that the light should be shewn from time to time so long as the vessel in which it is shewn continues to be an overtaken one. It is true that there may be a want of a proper look-out on the overtaking ship, but these rules are framed to guard not merely against the defects of men's sight, but of their minds and their attention. It might well have been here that through neglect the flare-up was not seen, but it might have been noticed if again exhibited from time to time. It is unnecessary for me to define at what intervals of time this flare-up should be shewn, that is a practical question which depends on the speed at which the vessel is overtaking the other, but of this I am clear, that one short exhibition is not enough. Therefore, though I hold that the *Essequibo* was to blame for want of a good look-out, I am of opinion that the *Hoffnung* is also to blame for a breach of art. 11.

Solicitors for plaintiffs: *Stokes, Sanders, & Stokes*.

Solicitors for defendant: *Wilson, Bristows, & Carpmæl*.

E. S. R.

1888

Feb. 20.

THE PATROCLUS.

Damage—Regulations for Preventing Collisions at Sea, Art. 11.

In an action for collision it appeared that one of a pair of ordinary binnacle lamps in the plaintiffs' vessel was temporarily removed from its place and used as a stern light :—

Held, that in the absence of affirmative evidence of its efficiency on the particular occasion it could not be deemed to be such a light as is required by art. 11 of the Regulations for Preventing Collisions at Sea.

ACTION OF DAMAGE. The plaintiffs were the owners of the sailing vessel *Cromartyshire*, and the defendants were the owners of the steamship *Patroclus*. Whilst the latter vessel was overtaking the former the first mate, who was in charge of the *Cromartyshire*, took one of the binnacle lamps from its place and exhibited the light over the stern of the ship. But the *Patroclus* came into collision with the *Cromartyshire*, striking the port quarter of the latter with the bluff of her starboard bow. In addition to the several questions of fact raised in the case the point arose as to whether the exhibition of this binnacle light was a compliance with art. 11 of the Regulations for Preventing Collisions at Sea. (1)

Hall, Q.C., and A. Thomas, for the plaintiffs.

Sir W. Phillimore, and Aspinall, for the defendants.

THE PRESIDENT. I agree with Mr. Hall that art. 11 does not prescribe any particular light to be shewn by the overtaken to the overtaking vessel. It only requires that the former vessel shall shew a white light or a flare-up light. But it is obvious that the light must be a sufficient light for the purposes of the article in question, viz., that it shall indicate to the overtaking vessel the position of the vessel on which it is exhibited. As to the light shewn in this present case, I am of opinion that the lamp is capable of being made to give a light which might be sufficient if all circumstances happened to concur favourably. At the same time I must say that the Trinity Brethren are of opinion that this

(1) Art. 11. "A ship which is being overtaken by another shall shew from her stern to such last-mentioned ship a white light or a flare-up light."

is not in itself a proper light. The lamp is made for a purpose totally different to that for which it was used on the instant in this case, for it is constructed to throw the light down, and not forward. It is made to hang in a particular position, and not to be carried in the hand. If anyone holds it, its tendency is to point downwards, and so the light might well not be seen at all, except for a few yards distance. If, on the other hand, it is held so as to make the light shew, then there is a tendency for the chimney to be out of the perpendicular, and the glass to get smoked. Further, there is the small scope of light which is visible from it.

I have therefore to consider whether on the present occasion it was a sufficient light. I do not think it was. [The President then examined the evidence, and found that the light was exhibited at too late a time, and was seen as soon as it could be by those on board the *Patroclus*.] As regards the light, I find that it may be an efficient light, but it would be so by accident only. I therefore hold the *Cromartyshire* alone to blame for this collision.

Solicitors for plaintiffs: *Ingledew, Ince, & Vachell, Cardiff*.

Solicitors for defendants: *Thornely & Cameron, Liverpool*.

E. S. R.

THE NIOBE.

Feb. 15, 21.

Ship—Collision—Relation of Tow and Tug—Liability of Vessel in Tow.

A tug with a vessel in tow came into collision with another vessel, which was seriously injured by the tug, but not injured by the vessel in tow. The collision might have been avoided had there been a good look-out on the vessel in tow, and had she warned the tug that the latter was in danger of collision by continuing on her course:—

Held, that the owners of the vessel in tow were liable.

Per SIR JAMES HANNEN (President). Under an ordinary contract of towage, the vessel in tow has control over the tug, and is therefore liable for the wrongful acts of the latter, unless they are done so suddenly as to prevent the vessel in tow from controlling them.

ACTION of damage by collision. The plaintiffs were the owners of the steamship *Valetta*, the defendants were the owners of the ship *Niobe*, which at the time of collision was in tow of the

1888 tug *Flying Serpent*; the owners of the latter admitted their liability
 THE NIOBE. for the collision.

Myburgh, Q.C., and Hollams, for the plaintiffs.

Sir W. Phillimore, and Barnes, for the defendants.

The facts and questions raised are fully dealt with in the judgment of the learned President. In addition to the cases mentioned in the judgment, the following were also referred to: *The Bernina* (1); *Jones v. Corporation of Liverpool* (2); *The Duke of Sussex* (3); *The Druid* (4), by counsel for the plaintiffs. *The Gipsy King* (5); *The Ticonderoga* (6); *The Christina* (7); *The Cleadon* (8); *Smith v. St. Lawrence Tow Boat Co.* (9), by counsel for the defendants.

Cur. adv. vult.

Feb. 21. THE PRESIDENT. The collision which was the subject of inquiry in this case occurred on the night of March 23, 1887, between the sailing vessel *Valetta* and the tug *Flying Serpent*, while the latter was engaged in towing the ship *Niobe* from Greenock to Cardiff.

The *Valetta* was sailing on a course N.E. by E. with a N.W. wind at a rate of seven and a half knots, with her side lights burning brightly, when the look-out saw the two masthead lights of the *Flying Serpent* at a distance estimated as three miles, and about three points on the *Valetta's* port bow. The green light of the tug and her tow soon after came in view. The *Valetta* kept her course, but the *Flying Serpent* continued to approach the *Valetta*, until with her stem and starboard bow she struck the *Valetta's* port bow, causing such damage that the *Valetta* shortly afterwards sank, and two of her crew were drowned.

For the *Niobe* it was contended that the collision was caused solely by the negligence of the *Flying Serpent*, and that she (the *Niobe*) is not responsible for the misconduct of the tug.

I shall first consider whether there was any negligence on the

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| (1) 12 P. D. 58. | (5) 2 W. Rob. 537. |
| (2) 14 Q. B. D. 890. | (6) Swa. 215. |
| (3) 1 W. Rob. 274. | (7) 3 W. Rob. 27. |
| (4) 1 W. Rob. 391 (399). | (8) 14 Moo. P. C. 92. |
| (9) Law Rep. 5 P. C. 308. | |

part of the *Niobe*; and secondly, whether that negligence, if it existed, contributed to the collision.

1888

THE NIOBE.

The *Flying Serpent* and her tow were on a S. S. W. course, and had the *Valetta* on their starboard bows, while the *Valetta* sailing on a converging course of N. E. by E., had the tug and tow on her port-bow. There can be no doubt that there was a defective look-out on the *Flying Serpent*, and that she consequently took no step to keep out of the way of the *Valetta*. Let us see what was the state of things on board the *Niobe*.

The *Flying Serpent* was towing the *Niobe* with a scope of hawser of about 100 fathoms. The look-out man on the *Niobe* says that he first saw a dim bright light on the *Valetta* two points on the port bow at about four ships' lengths off. This, then, must have been when the *Flying Serpent* was close to the *Valetta*. The white light which the look-out man saw was, as the captain of the *Niobe* conjectures, probably a companion or binnacle light. The look-out man reported this light, and immediately afterwards saw the loom of the *Valetta's* sails, and then the red light, but before he had time to report it he heard the crash of the collision, which he says took place immediately after he saw the sails. Later on he stated that he only saw the red light after he heard the crash, and finally he said he almost "saw the lot at once."

This evidence seems to shew very clearly that there was a bad look-out on the *Niobe*.

The evidence of the captain of the *Niobe* does not materially alter that of the look-out. The captain "was below when he heard the report of a light," he immediately came on deck and saw a white light two or three points on the starboard bow at a distance which he cannot estimate, he immediately ordered the helm hard-a-port. He did not hear the crash or know when the tow rope was cast off, but he thinks seven or eight minutes elapsed from giving the order hard-a-port till the *Niobe* struck the *Valetta*, or after the tug struck her. Seven or eight minutes is probably more time than passed between the order hard-a-port and the collision of the *Niobe* with the *Valetta*, but this question of time is not material, as I think that all that could be done was done when the light of the *Valetta* was seen, but I consider that it ought to have been seen sooner.

1888

THE NIOBE.

The next question is, whether this negligence of the *Niobe* contributed to the collision between the *Flying Serpent* and the *Valetta*.

On this, I think, the evidence of the captain of the *Niobe* decisive.

He says that if he saw his tug taking a wrong course, he certainly should endeavour to control the tug—if he saw the tug taking a direction leading to danger he should apprise her of it, and that he should do so by altering his own course, and this would be an effectual mode of doing it. That if he had seen the red light of the *Valetta* sooner he should have ported sooner, but that he should let the tug get within a mile—about a mile—before he should have thought it necessary to port, and that as it was his porting was so late that the tug could not take the hint. If he had seen the red light at half a mile, he could have “girted” the tug. That is, he could have checked her by shearing to the right under a port helm. “Girting” the tug, he says, is a common manœuvre.

I have put the question to the Trinity Brethren whether, if the red light of the *Valetta* had been sooner seen by those on board the *Niobe*, she could by porting her helm have checked the course of the tug, and have prevented the collision between the tug and the *Valetta*. I am advised that she could, and that that would have been the proper seamanlike measure to adopt in these circumstances. And as I find as a fact that there was nothing to prevent the red light of the *Valetta* being seen at the regulation distance, it follows that the bad look-out of the *Niobe* contributed to the collision. I am further advised that if the *Valetta* had been seen sooner the *Niobe* ought to have signalled by lights to her tug that she was moving into danger. And to the objection that this might have distracted the attention of the tug from looking ahead, the answer is, that the *Niobe* would have had no right to assume that there would not be a sufficient look-out on the tug to look forward as well as astern.

Taking this view of the facts I doubt if the questions of law which have been discussed before me arise upon this occasion, but I will shortly state my opinion upon the points raised.

It was contended that the relation of the tug-owner to the

tow-owner is that of an independent contractor, and therefore that the principle of the case of *Quarman v. Burnett* (1) is applicable, and the tow-owner and his vessel are not responsible for the negligence of the tug-owner and his servants. The basis of the decision in *Quarman v. Burnett* (1) is that the hirer of horses with a driver from a job-master has not under ordinary circumstances the management of the horses; but Parke, B., says, "It is undoubtedly true that there may be special circumstances which may render the hirer of job horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner which occasions the damage complained of, or to absent himself at one particular moment, and the like." But it appears to me that the authorities clearly establish that the tow has, under the ordinary contract of towage control over the tug. The tug and tow are engaged in a common undertaking, of which the general management and command belongs to the tow, and in order that she should efficiently execute this command it is necessary that she should have a good look-out and should not merely allow herself to be drawn, or the tug to go, in a course which will cause damage to another vessel. As Dr. Lushington has pointed out, it is essential to the safety of vessels being towed that there should not be a divided command, and convenience has established that the undivided authority shall belong to the tow. The pilot, if there be one, takes his station on his tow, and the officers of the tow are usually, as in the present case, of a higher class and better able to direct the navigation than those of the tug. The practice which experience has dictated has received the sanction of many legal decisions, and has been recognised in the House of Lords in *Spaight v. Tedcastle* (2), where Lord Blackburn says that it is the duty of the tug to carry out the directions received from the ship, and of the Privy Council in *The American* and *The Syria*. (3) Although in this latter case it was held from the special circumstances that the command belonged to the tug and not to

1883

THE NIOBE.

(1) 6 M. & W. 499.

(2) 6 App. Cas. 217.

(3) Law Rep. 6 P. C. 127.

1888

THE NIOBE.

the tow, I may observe that it is clear from the evidence in this case that it was perfectly well understood by the captains of the tug and tow that the latter had the control of their movements, and that it was the duty of those navigating the tow to keep a look-out and check the tug if it were going wrong.

But it was argued, that whatever the relation of the tug and tow may generally be, they were reversed in this case by special circumstances: first, by the contract of towage between the parties. But there is nothing in the contract but a bare agreement to tow. Secondly, by the fact that the towage was at sea with a long scope of hawser, and that this gives rise to different duties on the part of the two vessels to those which exist on a river towage with a shorter scope of cable. I agree that in a towage at sea with a long scope it is more difficult for the tow to communicate with the tug.

If it had been shewn that the *Flying Serpent* had, by some sudden manœuvre, which those on board the *Niobe* could not control, brought about the collision, I should have held the *Niobe* blameless. Thus, in *The Stormcock* (1) I held the tug to be responsible, because the tug which was originally steering a safe course so suddenly departed from it that the tow could not check her or follow without striking another vessel. I think that the same result would follow in a river towage in like circumstances. But in the present case the action of the *Flying Serpent* was not sudden, and might have been prevented by those on board the *Niobe*, if they had done their duty.

Lastly, it was contended, that the *Niobe* was not liable because the mischief was not done by contact with her. I am of opinion that this is immaterial where, as I find in this case to be the fact, the collision between the tug and the complaining vessel might have been avoided but for the contributory negligence of the tow.

Solicitors for plaintiff: *Hollams, Son, & Coward.*

Solicitors for defendant: *T. Cooper & Co.*

(1) 4 Asp. Mar. L. C. 410.

THE ARGENTINO.

1888

Jan. 31;
Feb. 14.

*Collision—Damages—Agreement to provide Vessel for particular Voyage—
Absence of definite Charterparty.*

In an action for a collision between two vessels it appeared that the defendants, the owners of one of the vessels, had made a verbal agreement with certain shipbrokers that on the arrival of the vessel in the Thames she should proceed to Antwerp, and there load goods for conveyance to the Black Sea by a specified route, and that the vessel had been accordingly, with the knowledge of the defendants, advertised to load for and sail on the route in question. Before the vessel could take her place at the loading-berth the collision took place, and she was prevented from loading and sailing as arranged :—

Held, that notwithstanding the absence of a regular charterparty the defendants were entitled to recover damages arising from the inability to fulfil their contract, as there was a definite assurance that benefit would be derived from it.

MOTION in objection to the registrar's report. The reference prior to the report arose out of an action of damage between the owners of the *Gracie* and the owners of the *Argentino*, in which it was agreed that both vessels were to blame for a collision, the cause of the action. One head of the damages claimed by the owners of the *Argentino*, the defendants in the action, was for loss of profit caused by the collision ; the claim was disallowed by the registrar on the ground that it was too remote, and it was to this part of the report that the owners of the *Argentino* objected.

The following statement of the facts is taken from the judgment of the Court :—

Messrs. Westcott & Laurence are shipbrokers in London, who collect cargo at Antwerp and London for conveyance to the Black Sea by two different routes, and the vessels employed for each voyage called at different specified ports on the way, one route or round ending at Batoum, the other at Odessa.

About a week or ten days previous to the collision, Mr. Westcott, a partner in the above-mentioned firm, called on Mr. Porteous, the managing owner of the *Argentino*, and inquired if he had a boat to load for the Batoum route, and being informed of the expected arrival of the *Argentino*, it was verbally arranged that the *Argentino* as soon as she arrived and discharged her cargo and could be ready should proceed to Antwerp to load for the Batoum

1888
THE
ARGENTINO

route. After the *Argentino* had arrived in the Thames, and had collided with the *Gracie*, and in consequence needed repairs which would take some considerable time, it was arranged between Mr. Westcott and Mr. Porteous that Mr. Westcott should engage another vessel in lieu of the *Argentino* for the contemplated voyage to Batoum, and accordingly Mr. Westcott engaged the *Beta*, which loaded at Antwerp and in London, and made the same round to Batoum as it was intended the *Argentino* should make.

The *Beta* commenced this round by leaving London for Antwerp on March 7, and after loading some cargo there returned to London for further cargo, and finally sailed from the Thames about March 20.

The repairs to the *Argentino* were finished on March 18, and a few days before that date Mr. Westcott proposed to Mr. Porteous to load the *Argentino* for the Odessa route, an offer which Mr. Porteous accepted, and, accordingly, on March 19 or 20 the ship left Antwerp, where she loaded about 300 tons, sailed thence for London on the 27th, where she loaded 1000 tons more, and finally sailed from London on the Odessa round on April 10.

The result of the voyages of the *Beta* and the *Argentino* respectively was this—the *Beta* earned a gross freight on the Batoum round of 1536*l.*; the *Argentino* a gross freight on the Odessa round of 1088*l.*; shewing a difference of 455*l.*, which sum is claimed as a loss or damage arising from the collision. It was further said that had the *Argentino* made the same round as the *Beta* did, she would have loaded a full cargo, and being a larger vessel would have consequently earned a larger gross freight than the *Beta* by 93*l.*, which is claimed as a further loss resulting from the collision.

Again, in consequence of the *Argentino* being eight days longer loading than the *Beta*, which was attributed to her cargo not being equally ready for shipment as the *Beta's*, eight days' demurrage of the ship was claimed at the rate of 29*l.* 14*s.* 2*d.* per day, equal to 237*l.* 13*s.* 4*d.*, thus making the total claim for consequential damages under this head of 815*l.* 13*s.* 4*d.*

Sir W. Phillimore, and *Boyd*, for the defendants. The regis-

trar has misapprehended the facts, and proceeded on a wrong principle. The ship must be treated as a thing which earns profit, and the rule as to damages is to give the claimants the value of the ship plus the value of her engagement. The defendants were therefore entitled to the full amount they claim: *The Star of India* (1); *The Consett*. (2) There was a distinct agreement that the *Argentino* should have the next turn at Messrs. Westcott & Laurence's berth, and this was lost through the collision. The effect of the contract was to confer a mutual benefit upon Messrs. Westcott & Laurence and the defendants.

1888
THE
ARGENTINO.

Finlay, Q.C., and *Nelson (Meager, with them)*, for the plaintiffs. No contract as to the chartering of the *Argentino* was proved. *The Star of India* (1) and *The Consett* (2) are distinguishable, for there was in each of these cases an actual charterparty. Mere expectation of profit cannot be an element in the assessment of damages, as it is too remote. The case is governed by *The Parana* (3); *The Notting Hill* (4); *The Clarence*. (5)

Boyd, in reply.

Cur. adv. vult.

1888. Feb. 14. THE PRESIDENT. The facts of this case are very clearly stated in the report of the registrar. [The President then stated the facts as already set out.] First of all as to what the registrar calls a verbal arrangement; he appears to rest his judgment on it being a verbal arrangement, but I think that his meaning is that it was not a binding agreement. If I agreed with that view I should not interfere with this report. But I am of opinion that this is not a true view of the facts. Messrs. Westcott & Laurence are in the habit of collecting goods to send to the Black Sea, and they have certain rates of freight for so doing. This course of business was perfectly well known to the parties to this transaction. For it appears that the defendants' vessels had been previously employed for this particular line, and the probability of a remunerative employment of the *Argentino* was thus in the contemplation of both parties. The contract, therefore, in fact, was

(1) 1 P. D. 466.

(3) 2 P. D. 118.

(2) 5 P. D. 229.

(4) 9 P. D. 105.

(5) 3 Wm. Rob. 283.

1888

THE
ARGENTINO.

Sir J. Hannen.

that in consideration that *Porteus* supplied the *Argentino* to carry the cargo collected by *Westcott & Laurence*, *Porteous* allowed that vessel to collect their cargo and carry it on the advertised voyage. That was a binding agreement. A fact which leads me further to consider this to be something more than a mere negotiation is that the *Argentino*, with the knowledge of her owners, was advertised to load and sail after the *Rhone*. And it was as sure as anything in business could be that the *Argentino*, except for some accident, would reap the benefit of this contract.

The registrar in his report states that he was referred to the case of *The Star of India*. (1) He distinguishes that case from the present on the ground that the arrangement in the present case "had not the force and effect of a definite charterparty under which a specific amount of gross freight is contracted for." I differ from the learned registrar on this point. There is nothing special in the advantage to be derived from a definite charterparty, it is sufficient if there is something which leads to a definite assurance that some benefit will be derived, whether it be from a charterparty or an agreement not of that kind. *The Star of India* (1) was followed in *The Consett* (2), but I was referred to a case earlier than either of these in which the guiding principle is clearly laid down. In *The Clarence* (3), Dr. Lushington says: "It does not follow as a matter of necessity that anything is due for the detention of a vessel whilst under repair. Under some circumstances undoubtedly such a consequence will follow, as for example where a fishing voyage is lost, or where the vessel would have been beneficially employed. The onus of proving her loss rests with the plaintiff, and this onus has not been discharged on the present occasion. Had the owners of the *Clarence* proved that the vessel would have earned freight, and that such freight was lost by the collision, the case would have fallen within the principle to which I have last adverted; I therefore pronounce against the objection, and confirm the report with costs." In the present case, for the reasons I have given, I am of opinion that the owners of the *Argentino* have proved that freight would have been earned, and that it was lost through the collision.

(1) 1 P. D. 466.

(2) 5 P. D. 229.

(3) 3 Wm. Rob. 283.

The nature of the advantage which has been lost is not indeed quite as clear as it would have been under a charterparty, at the same time its character is clear though the amount is uncertain. The *Argentino* was entitled to take her turn as publicly advertised, and to receive for carriage such cargo as had been collected for the voyage by Messrs. Westcott & Laurence. The rate of freight was fixed, but it was not certain that there would be a full cargo, though the contract was entered into under the expectation that there would be a full cargo. I am of opinion therefore that it can be held that a definite advantage which would have arisen from the agreement in question was prevented by this collision from being obtained by the owners of the *Argentino*, and that therefore this loss ought to be taken into account in estimating the damages which they have suffered. Counsel for the plaintiffs endeavoured to liken the case to that of *The Parana* (1), where it was held that loss of market could not be allowed. But Mellish, L.J., clearly pointed out the reason for this, viz., that the loss of a market is purely speculative. I am of opinion that there is nothing speculative about this loss, its nature is defined, and its amount is ascertainable. I am therefore of opinion that the amount awarded by the registrar to the owners of the *Argentino* was not enough, and that the amount which the *Argentino* has really lost must be ascertained.

As was pointed out in *The Clarence* (2), it does not follow that damages for the detention of the vessel should necessarily be allowed, but it is usually assumed that a vessel will find employment. *Primâ facie*, indeed, the *Argentino* lost all the profits she would have gained if she had been allowed to take her turn as arranged. But she is not therefore entitled to remain idle, and she will only be allowed such damages as would result from her being obliged to be employed in some less remunerative way than she would have been employed in under the original contract. It is said by the registrar that there was no evidence that the *Argentino* could not have got employment as profitable as the *Beta's* from other brokers, if it had been sought for. If the registrar and merchants, from evidence before them, or from their own great and special knowledge of these matters, had been

1888

THE
ARGENTINO.

Sir J. Hannen.

(1) 2 P. D. 118.

(2) 3 Wm. Rob. 283.

1888

THE
ARGENTINO.

Sir J. Hannen.

able to say that the *Argentino* was not properly employed by going on the Odessa route, I should not have dissented from this view. But I think it is incorrect to say that the owners of the *Argentino* were bound to shew that she could not have got employment as profitable as the *Beta's* from other brokers. The question is whether there is anything to shew that this substituted voyage, entered into in good faith, was not the best thing under the circumstances. If it was, then the difference between the advantage derived from the two voyages must be taken as a natural result of the impossibility of fulfilling the contract which arose in consequence of the collision.

Therefore I think that this case must go back to the registrar to ascertain the amount of loss which the owners of the *Argentino* suffered from their vessel not being able to fulfil her contract. In this particular case there was another voyage which lasted about the same time as the Batoum voyage would have taken, and so it naturally presents itself as a subject of comparison. Great difficulties might have arisen if the *Argentino* had been employed on a totally different service, on a voyage of much longer or shorter duration, but as it is there is an easy means of ascertaining the loss which the vessel suffered. It is also said that the cargo was laden more expeditiously in the *Beta* than on the *Argentino* by eight days, and damages are therefore asked for specifically under this head. But I am of opinion that this cannot be treated as a specific amount of damage, though it must be taken into consideration. It will depend whether in the employment of a vessel in the ordinary way, eight days demurrage is an extraordinary length of time; if it was, and if the owners of the *Argentino* entered into a contract which caused them to be detained for an unreasonable number of days, that loss must not fall on the owners of the other vessel. If, however, eight days, or any other number of days, is a reasonable amount of demurrage, and is usually contemplated in loading a cargo of this description on a vessel of this class, then it must be taken into consideration in estimating the damages.

As to the capacity of the *Argentino*, it appears she was larger than the *Beta*. If the facts are as alleged, she would have obtained a cargo greater in quantity than that which the *Beta* carried. The

difference would be part of the loss which the owners sustained by this collision. I must therefore remit the report to the registrar for reconsideration on the principles which I have laid down.

1888

 THE
ARGENTINO.

Solicitors for owners of the *Gracie*: *Lowless & Co.*

Solicitors for owners of the *Argentino*: *Downing & Holman.*

 E. S. R.

 DAINTREE & BUTCHER v. FASULO AND OTHERS.

 Jan. 11.

Will and Codicil—Execution—Acknowledgment.

A testatrix exhibited a codicil to her last will, which was entirely in her own handwriting, to one of the attesting witnesses, telling her she had something which required two witnesses. Subsequently, the second attesting witness having come into the room, they both signed, but the testatrix did not tell them that it was a testamentary paper, nor did they know what sort of paper it was that they had attested. They did not recollect seeing the testatrix sign, but one of them was clear that her signature was there at the time they signed:—

Held, that this was a sufficient acknowledgment by the testatrix of her signature, and that the codicil was entitled to probate.

THE plaintiffs propounded, as residuary legatees, the will of Miss Mary Anne A. Hainworth, executed September 29, 1877. The defendants in their statement of defence and counter-claim admitted the validity of the will, and propounded a codicil, dated March 18, 1886, to which the plaintiffs in their reply pleaded that the codicil was not duly executed.

The case was heard before the Court without a jury.

On behalf of the defendant the two attesting witnesses to the codicil, Miss Hepburn and Miss Whympier, were called, who described the circumstances attending its execution. The deceased was staying at the house of Miss Hepburn at Haslemere, and came into the dining-room one morning, bringing a paper in her hand, saying: I have got something here which requires two witnesses; will you sign it, and let your servant sign it? Miss Hepburn said she would sign it, but not wishing her servant to be brought into the matter she would get Miss Whympier, who lived next door, to sign. Later on in the day Miss Hepburn and Miss Whympier went into the dining-room, and Miss Hainworth producing a paper was about to say something about it, when Miss Hepburn stopped her, saying she would prefer not to know

1888

DAINTREE
& BUTCHER

v.

FASULO.

what it was. Miss Hainworth thereupon was silent, and both the witnesses signed the paper, which they identified in Court as the codicil.

Miss Hepburn said she felt sure that the name of the testatrix was on the paper when she signed it, but she could not recollect that the testatrix had signed in her presence. She did not read the paper, and was not aware that it was a testamentary paper. She wrote the word "witnesses" before her signature.

Miss Whympster was unable to state positively whether she was asked to sign by the testatrix or by the other attesting witness; but when she went into the room the testatrix had the paper in her hand. She had no idea what sort of document it was she was signing. She could not recollect seeing the testatrix sign, but she thought that her signature was there when she put her name to the paper.

Bayford, Q.C. (*Barnard* with him), submitted that on this evidence the testatrix had neither signed nor acknowledged her signature in the presence of the attesting witnesses, and that the codicil therefore was not duly executed. The mere production of the paper was not sufficient.

Inderwick, Q.C. (*Middleton* with him), contended that the presentation of the paper containing the signature, and the request to the witness to attest, constituted a virtual acknowledgment of the signature.

[In the course of the argument *Inglesant v. Inglesant* (1), *In the Goods of Thompson* (2), *Blake v. Blake* (3), *Ilott v. Genge* (4), and *Pearson v. Pearson* (5), were referred to.]

BUTT, J. The first question I have to decide here is whether the will of the testatrix, Miss Mary Anne Hainworth, made on September 29, 1877, was duly executed. About this there is no contest; the parties are agreed, and the evidence of the witnesses called is sufficient to prove the due execution of the will. Having regard to all the circumstances, I have no hesitation in admitting the will to probate.

(1) Law Rep. 3 P. & M. 172.

(2) 4 Notes of Cases, 643.

(3) 7 P. D. 107.

(4) 4 Moore, P. C. 265; 3 Curt. 160.

(5) Law Rep. 2 P. & M. 451.

Then the material question of this case arises. The will having been made on September 29, 1877, there is a codicil materially affecting it, said to have been executed on March 18, 1886. Both documents, the will and the codicil, are informal. Both are in the handwriting of the testatrix and both are signed by her. It is clear that on the day of the attestation of the codicil, the testatrix produced it, and asked one of the two attesting witnesses, Miss Hepburn, to sign it and also to allow her servant to sign it. Miss Hepburn objected to bring her servant into the matter, and the other attesting witness, Miss Whympier, was called in or came in, and subscribed as an attesting witness. It does not appear that anything was said to either of the attesting witnesses by the testatrix to the effect that the paper in question was her will, or even that it was any sort of testamentary document. It does not appear that either of them was aware that it was a testamentary paper. Still they were asked to sign it, the first witness by the testatrix herself, and the second either by the testatrix herself or by Miss Hepburn, in her presence and hearing, which would be the same thing. They signed their names as witnesses, and it is a fact in the case that the word "witnesses" is written before the first of the two names. Was the signature of the testatrix above the attestation written there at the time they signed? Neither of the attesting witnesses has been able to say positively that they saw it there, or that it was there, but I think there can be no doubt that it was there. We have then this state of things; the signature of the testatrix was there, visible and open to the attesting witnesses, if they had looked to see it, for there was no pretence of covering it up, and though they cannot say that it was written there in their presence, a fair inference is that it had been written there before they signed. Having regard to these facts, is the will valid? It was not, to use the words of the 9th section of the Act, "made by the testatrix in the presence of the two attesting witnesses," because the signature had been put on it before. Was it, then, "acknowledged in the presence of the two attesting witnesses," to use again the words of the Act, and upon that the question arises, what is an acknowledgment? The paper was produced with the testatrix's signature upon it, and the witnesses were asked to subscribe as witnesses. I think that is, as I have

1888

DAINTREE
& BUTCHER
v.

FASULO.

Butt, J.

1888

DAINTREE
& BUTCHER
v.

FASULO.

Butt, J.

already said, a fair inference of fact. In substance it amounts to this,—Here is a paper signed by the testatrix. They are not told what it is, they are not told that it is a will or a testamentary paper, but they are asked to sign their names as witnesses. They do so. Is that a sufficient acknowledgment of the signature being the signature of the testatrix? I hold that it is, and I should have held so apart from any authorities, but the general tenor of the authorities which have been cited supports the proposition, which I hold to be a good one. I do not think that the case of *Blake v. Blake* (1) is any authority to the contrary, because the whole of the observations of the learned judge there were based on the facts of the case; a leading and prominent fact of the case being that the witnesses never could and never did see the signature of the testator. In *the Goods of Thompson* (2), decided by Sir H. Jenner Fust in 1846, is an authority in favour of Mr. Inderwick's contention, as I read it; a direct authority, because there, the signature of the testator had been affixed to the document before the attesting witness saw it, and there was no statement to that attesting witness as to the nature of the document or as to the testator's signature. All that was said was "sign the paper," and it was held that the circumstances amounted to a virtual or constructive acknowledgment by the testator. In *Pearson v. Pearson* (3) Lord Penzance treats that decision as practically overruled by the Privy Council in *Ilott v. Genge* (4), because he says, after reviewing the cases, "I have come upon *Ilott v. Genge* (4), in which Sir H. Jenner Fust repeats the same observation: 'The production of a will by a testator, it having his name upon it, and a request to the witnesses to attest it, would be a sufficient acknowledgment of the signature under the present statute.' In that case there was an appeal to the Privy Council and their Lordships decided that even assuming a will which was signed by the deceased before the witness had been called in, the mere circumstance of calling in the witnesses to sign, without giving them any explanation of the instrument they are asked to sign, does not amount to an acknowledgment of his signature by a testator. As the case of *Ilott v. Genge* (4) was decided by a Court of Appeal it has set aside

(1) 7 P. D. 107.

(2) 4 Notes of Cases, 643.

(3) Law Rep. 2 P. & M. 451.

(4) 4 Moore, P. C. 265.

any observations not in accordance with it made in *In the Goods of Thompson*." (1)

I do not quite understand what is meant by that. I doubt whether there is any observation of Sir H. Jenner Fust in *In the Goods of Thompson* (1) which is inconsistent with the decision in *Ilott v. Genge* (2); but if there be I cannot help thinking that Lord Penzance had lost sight of what was the leading feature in *Ilott v. Genge* (2), but which did not exist in *In the Goods of Thompson* (1), viz., that the witnesses were not allowed to see the testator's signature, which was covered up. That made the whole difference between the two cases. Holding *Ilott v. Genge* (2) to be good law, which of course I do, there is nothing in that case to affect the decision of Sir H. Jenner Fust. I do not agree with Lord Penzance that *In the Goods of Thompson* (1) was overruled by *Ilott v. Genge* (2), and I consider myself at liberty to act upon it. The result is, that I shall pronounce for this codicil as well as the will, giving the costs of all parties out of the estate.

1888

DAINTREE
& BUTCHERv.
FASULO.

Butt, J.

Solicitors for plaintiffs: *Hepburn, Son, & Outcliffe*,
Solicitors for defendant: *Storey & Cowland*.

W. L.

IN THE GOODS OF G. H. WEBB.

March 6.

Administration with Will annexed—Grant to a Stranger in Blood—Minor.

Where upon an application for administration with the will annexed it appeared that the testator's children were minors, the Court granted administration to a stranger in blood elected by the children as their testamentary guardian, without notice to the next of kin entitled to the grant, on proof that one had renounced and that the remainder were at a distance, or that their place of residence was unknown.

APPLICATION for administration with the will annexed.

G. H. Webb died January 28, 1888, a widower, leaving three children, his natural and lawful issue, of the ages of eighteen, sixteen, and thirteen surviving.

By his will, dated July 1, 1887, he did not nominate any executor, but it contained these passages: "I declare that there

(1) 4 Notes of Cases, 643.

(2) 4 Moore, P. C. 265.

1888

IN THE
GOODS OF
WEBB.

shall be incorporated in this my will all statutory powers for the appointment of trustees, and the substitution of other trustees if necessary; and I direct that if I do not by any codicil hereto annexed appoint any person to be my trustee or executor until my son and daughters attain the age of twenty-one, then the person appointed by the Court exercising jurisdiction under the statute shall have all the powers of an executor; but in no case shall any relative of mine be so appointed by the Court as trustee or executor of this my will."

The testator did not execute any codicil to his will.

The relatives on the father's side were a half-brother, William Webb, resident in London, but unknown to the children, who was supposed to have been unfortunate in business; an aunt by marriage who had renounced her right; an uncle for many years resident in New Zealand, but whose whereabouts was unknown; and an uncle, resident in Suffolk, of nearly eighty years of age.

On the maternal side there was an unmarried aunt resident in Paris and an uncle (a half-brother of the mother) believed to be resident in London, but whose address was unknown.

The children of deceased had nominated Mr. E. A. Rich, of Ryde, Isle of Wight, to be their curator and guardian.

Middleton, moved for a grant of administration with the will annexed to Mr. Rich and without notice to the relatives of the children. He cited *In the Goods of Gardiner* (1), where the Court under similar circumstances made a grant to a stranger in blood.

BUTT, J. Your application goes beyond *In the Goods of Gardiner* (1), because all the relatives there were disposed of in one way or the other, and here there is only one who has renounced. But, under all the circumstances, I think the grant may go.

Solicitors: *Lambert, Petch, & Shakespear, agents for T. White, Ryde, Isle of Wight.*

(1) 9 P. D. 66.

W. L.

BUTLER v. BUTLER.

1888

Feb. 21.

Divorce—Advertisement offering Reward for Evidence—Contempt of Court—Attachment.

In a suit for divorce on the wife's petition on the grounds of adultery and cruelty, the husband caused to be printed and published about the district in which the wife and her family resided a notice purporting to be signed by him, offering a reward of 25*l.* for evidence of the confinement of a young married woman of a female child, "probably not registered":—

Held, that this was a contempt of Court as tending to prejudice the petitioner, and discrediting her in the assertion of her rights, and a writ of attachment ordered to issue.

Pool v. Sacheverel (1 P. Wm. 675) questioned.

APPLICATION for a writ of attachment for contempt of Court.

In this case the wife presented a petition dated November 20, 1887, praying for a dissolution of the marriage on the ground of her husband's cruelty and adultery, and on January 3, 1888, the husband filed an answer denying the adultery and cruelty.

Shortly after the institution of the suit the respondent caused the following notice to be placarded on the walls of the village in which the petitioner and her family resided and in the surrounding neighbourhood :

"25*l.* reward will be paid for full and legal evidence of the confinement of a certain young married woman of a female child, probably not registered, on or just before February 7, 1885, supposed to be in the neighbourhood of Derby, Alferton, or Mansfield, and now being nursed in one of those districts. Or a proportionate reward will be paid to any one who will give such information as will lead to the required evidence being forthcoming by

"Robert Butler,

"Ratcliffe-on-Trent, Nottingham."

The petitioner in her affidavit in support of the application stated that the respondent had told several persons that the reference in the bill was intended for her. She denied the truth of the suggestion it contained, and stated her belief that it was intended solely to annoy her, and to deter persons from coming forward to give evidence on her behalf.

The respondent also made an affidavit in which he admitted

1888
BUTLER
v.
BUTLER.

that he had caused the bills to be printed and posted, and, while disclaiming the mere intention to annoy, he charged the petitioner with having concealed the birth of a child, and asserted that the result of posting the bills had been to procure the evidence he required.

Bargrave Deane, moved for a writ of attachment against the respondent for contempt of Court, and cited *Pool v. Sacheverel* (1), where advertising for evidence was held to be contempt of Court.

[BUTT, J. Would it be contempt if a party charged advertising for evidence to prove his innocence.]

In *Daw v. Eley* (2), and in *Tichborne v. Tichborne*, reported in the note to that case, it was held that a publication of which the evident result would be to affect the administration of justice, though that might not have been the intention of the person publishing, was contempt.

[BUTT, J. I am not convinced that a bonâ fide attempt to get honest evidence would be a contempt of Court.]

The intention cannot be discovered until the case is tried. At this stage a distinction cannot be drawn between bona and mala fides—and the Court is bound to infer mala fides in such a publication. It is not the intention but the probable effect which must be considered, and in *Brodrigg v. Brodrigg and Wall* (3) the President held that such advertisements were not calculated to serve the interests of justice, and, as tending to deter witnesses from coming forward to give evidence, were a contempt of Court.

Bayford, Q.C., for the respondent. An advertisement of this kind may not be in good taste: but the motive was solely to obtain evidence, and it has so far succeeded that evidence has been obtained which would not otherwise have been forthcoming. The respondent in his affidavit denies that he had any desire to molest his wife, and he repudiates altogether any other motive but that of obtaining information. As to *Pool v. Sacheverel* (1), in the *Plating Co. v. Farquharson* (4), where advertisements for evidence were held not to be a contempt, Jessel, M.R., said; “I do not profess to understand that case as reported—with great respect to the learned Lord Chancellor, I should not have come

(1) 1 P. Wms. 675.

(3) 11 P. D. 66.

(2) Law Rep. 7 Eq. 49.

(4) 17 Ch. D. 55.

to the same conclusion on the same facts, and it does not appear to me that an advertisement for a witness to prove a thing not in the knowledge of the man who advertises for it, but which he believes to be true, can be treated as subornation of perjury, because subornation of perjury means doing something to induce people to come forward to prove that which the person seeking to prove it believes to be false, and on that distinction it seems to me the case ought to turn." James, L.J., in the same case said, with regard to the case referred to: "I am unable to reconcile it with the well-established practice of the government of the country of offering rewards for evidence in criminal cases."

1888

 BUTLER
 v.
 BUTLER.

BUTT, J. I doubt very much whether a bonâ fide attempt to procure evidence in a suit, even by an advertisement offering a reward, is a contempt of Court. I do not hesitate to say, that I felt somewhat pressed by the judgment in *Peere Williams*; but I am glad to find that the decision has been questioned in the Court of Appeal, and I do not feel myself constrained to follow it. The first question is, was the publication of this placard a bonâ fide attempt to get evidence, and has it been affixed in the places where it was affixed with that sole object and motive. I do not for a moment believe it was. I think the document, and the way in which it was placarded in the immediate neighbourhood of the relations of the wife and the husband, shew that there were other motives; and holding that, I think this action of the husband was a contempt of Court; but further, and apart from the question of intention, I think this is a document calculated to prejudice the petitioner in the eyes of the public, so as to discredit her in the assertion of her right in this Court. That being so I shall pursue the course which was taken in the case of *Brodribb v. Brodribb and Wall* (1), and I shall order this attachment to issue. But I direct it to lie in the office for three days, and during that time the respondent may make any application to the Court which he pleases on affidavit that he has removed these objectionable placards.

Solicitors for petitioner: *Clinton & Buckley.*

Solicitors for respondent: *Goldring, Mitchell, & Phillips.*

1888

March 6.

BOSVILLE v. BOSVILLE AND CRAVEN.

Divorce—Variation of Settlements—Registrar's Report—Wife's Power of Appointment and Power of appointing New Trustees—22 & 23 Vict. c. 61, s. 5.

In a petition for variation of settlements after a decree of dissolution on account of the wife's adultery, the registrar by his report recommended that the power of appointment over the fund given to the wife by the settlement should be extinguished, and that she should be deprived of the power of appointing or joining in the appointment of new trustees. The petitioner had signified his willingness that the respondent should continue to receive 100% a year out of 150% settled on her.

The Court confirmed the first of these recommendations, but disallowed the second, on the ground that as the respondent was to continue to receive an income from the fund she had an interest in the appointment of trustees.

An order extinguishing the power of appointment of funds in the settlement, is an order made, within the words of the section, "with reference to the application of the whole or a portion of the property settled."

APPLICATION to confirm the registrar's report on a petition for variation of settlements.

In this case a decree nisi was pronounced dissolving the marriage on the ground of the wife's adultery, which was made absolute on February 11, 1886.

A petition to vary the settlements made on the marriage was presented in December, 1887.

By the settlement a sum of 25,000% was settled on trust to pay 150% a year to the wife for the joint lives of the husband and wife, and the residue of the income to the husband. In case of the respondent surviving her husband the whole income of the fund was to be paid to her for her life, except that in the event of her remarriage the income was to be reduced to 500% a year. After the death of the petitioner and the death or remarriage of the respondent, the fund (subject in the last event to payment of the annuity of 500%) to go to all or such one or more of the issue of the marriage as the petitioner and respondent might jointly appoint, or in default of such appointment as the petitioner if he survived the respondent might appoint, or in default of any appointment to go equally among the children born of the marriage. There was one child of the marriage, a second child to which

Mrs. Bosville gave birth after her separation from her husband having been declared in a suit for declaration of legitimacy not to have been the child of Mr. Bosville.

1888
BOSVILLE
v.
BOSVILLE.

The registrar recommended (1) that the respondent should be deprived of a portion of the 150*l.* per annum payable to her under the settlement; (2) that the respondent's reversionary interest should be extinguished as if she were dead; (3) that the consent of the respondent should not be necessary for the exercise of any power of appointment under the deed, and that the trustees should exercise all powers and rights under the settlement as if she were dead; and (4) that the respondent should be deprived of the power of appointing or joining in the appointment of new trustees, and that such powers should hereafter be exercised by such person or persons as would be entitled to exercise the same in case she were dead.

Inderwick, Q.C. (*Middleton*, with him), for the petitioner, moved to confirm the registrar's report, and stated that the petitioner was willing that the income secured to the respondent should be fixed at 100*l.* a year.

Ram, for the respondent, opposed the third and fourth recommendations of the registrar's report extinguishing her power of appointing the fund, and her power of joining in the appointment of new trustees. The Court has no power to make such an order. The words of the statute (22 & 23 Vict. c. 61, s. 5) are that the Court may make such orders with reference to the application of such portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit. This is not an order "with reference to the application" of the fund—those words have never been carried further than investment. As the wife is to continue to receive an income from the trustees she must have an interest in any new nomination which may be necessary.

Inderwick, Q.C., in reply. The appointment of new trustees is certainly an order having reference to the application of the fund.

[In the course of the argument, *Oppenheim v. Oppenheim* (1);

1888

BOSVILLE

v.

BOSVILLE.

Davies v. Davies (1); *Hope v. Hope* (2); *Maudslay v. Maudslay* (3); *Noel v. Noel* (4), were cited.]

BUTT, J. This case comes before me in a not very regular form. I am asked to confirm the registrar's report. The first paragraph of that report merely recommends that some amount should be taken from the allowance of 150*l.* a year which the respondent at present enjoys. If I merely confirm that, nobody would know what she was to have or what she was to be deprived of. I have to say whether she should be deprived of the whole or any portion of the 150*l.*; and if so, what portion? At the outset I was strongly inclined to think that the wife should have the whole of the 150*l.*, and not merely the 100*l.* which is offered to her by her husband; but on reconsideration, and having regard to the facts of the case, and especially to the fact that she left her husband's home, and went away with the adulterer; that she did so under circumstances not offering the slightest excuse or palliation, and that she behaved thus to a husband who had always treated her with the greatest kindness, I am not disposed to give her more than he offers. The sum of 100*l.* must remain to her, and that must be secured to her under the settlement. With regard to the other matters which are dealt with in the report of the registrar. It suggests that the trustees of the settlement should apply the property settled, and deal with the money settled, in certain ways, without the respondent having any voice in the matter, and that she should be deprived of her power of appointment under the deed. With reference to that matter, it seems to me to divide itself under two heads. First of all, ought I to revoke her power of appointment as to the money given to her in the deed. It has been argued that I have no power to do that, and that my powers are limited by the words of the 5th section of the Matrimonial Causes Act, 1859, 'to making' an order "with reference to the application of the whole or any portion of the property settled." It is said that if I take away from the wife her power of appointment under the settlement, I am making an order which has no reference "to the application.

(1) 37 L. J. (P. & M.) 17.

(2) 3 P. & M. 226.

(3) 2 P. D. 259.

(4) 10 P. D. 179.

of property." I do not agree with that contention; I think I have that power under the words of the section. Then comes the question; having the power, ought I to exercise it? I see no reason why I should not; therefore, I shall adopt this recommendation of the registrar's report, and direct that the trustees of the indenture shall apply the property settled thereby upon such and the same trusts as would be applicable if the respondent were now dead, and had died in the lifetime of the petitioner. That recommendation of the report will be adopted subject to the reservation of the 100l. to the wife. Now comes the further recommendation of the report, that the respondent should be deprived of any power of appointment or of joining in the appointment of new trustees. It has been argued that I have no power under the 5th section to interfere with the wife's power of appointment of the money, and that still less have I power to revoke her right of appointment of new trustees. I am by no means clear that the words of the Act of Parliament have that meaning; but I do not think it necessary to decide the point. Inasmuch as the wife is to continue to receive part of the income of this trust fund from the trustees, I do not see that, even if I had the power, I should be well advised in exercising it. It is right that while she has a substantial interest in the application of these funds, she shall not be deprived of the power of dealing with the appointment of the trustees. That part of the recommendation of the registrar's report I therefore refuse to confirm, The order that I shall make will be that she is to be deprived of 50l. of the 150l. which she now enjoys, that the second and third recommendations of the report be adopted, and the fourth disallowed.

Solicitors for petitioner: *Collyer-Bristow & Co.*

Solicitors for respondent: *Gedge, Kirby & Millett.*

1888

BOSVILLE

v.

BOSVILLE.

W. L.

1888

March 20.

THE ORWELL.

*Practice—Lord Campbell's Act (9 & 10 Vict. c. 93)—Order xxvii., r. 4—
Assessment of Damages.*

An action for damages under Lord Campbell's Act was commenced in the Admiralty Division, and no application was made to transfer the cause to any other Division:—

Held, that upon default in pleading by the defendants the plaintiffs were entitled, under Order xxvii., r. 4, to enter interlocutory judgment and to have the damages assessed and apportioned by a jury.

SUMMONS referred to the judge in court by the registrar.

The plaintiffs were Mary Ann Hughes, widow, and her four infant children, and she sued the owners of the *Orwell* in personam for damages for the loss of her husband and the children's father in a collision in respect of which the *Orwell* had, in an action between the owners of the two ships, been found alone to blame by the Court. The defendants entered an appearance but did not deliver a statement of defence. The present application was on behalf of the plaintiffs for leave to enter up interlocutory judgment for damages to be assessed, and for a writ of inquiry for their assessment by the sheriff of Middlesex.

Barnes, Q.C., for the plaintiffs. This application is made under Order xxvii., r. 4, and the plaintiffs are entitled to an interlocutory judgment to have the damages assessed by a jury. The action being under Lord Campbell's Act (9 & 10 Vict. c. 93) could not have been tried in the Admiralty Court before the Judicature Acts: *The Bernina* (1); but it is retained in this Division as a part of the High Court of Justice, and so the Court has jurisdiction to make this order: Judicature Act, 1873, s. 16.

Raikes, for the defendants. It is admitted that this action could not formerly have been brought in the Admiralty Court, but the plaintiffs having selected their tribunal, the question of damages should be decided according to the procedure usually employed, viz., by a reference to the registrar and merchants:

The Gertrude. (1) The Court of Chancery had the power when the owners of a vessel limited their liability to distribute the amount rateably among the claimants: 17 & 18 Vict. c. 104, s. 514; this Division having now the power of the Court of Chancery can also adopt the procedure.

Barnes, Q.C., in reply.

1888

 THE
ORWELL.

THE PRESIDENT. I am of opinion that this application should be granted. It was established by *The Bernina* (2) that actions under Lord Campbell's Act were not at the time of the passing of the Act, within the jurisdiction of the Admiralty Court, but they have been now brought within the jurisdiction of this Division because an action may be begun in any Division of the High Court. If it is not part of the business assigned to that Division it may be transferred to a more appropriate Division. Here an action under Lord Campbell's Act has been begun in this Division, which the defendants have not asked to have transferred to the Queen's Bench Division. Therefore on the above principle I am entitled to entertain this application, although the action does not properly fall within the special business of this Division. How, then, am I to deal with this application? My decision in *The Gertrude* (1) has been pressed upon me. There I held that if the parties agreed to come into this Division, it must be assumed that they agreed to have the action tried according to the law and practice administered in this Division. If I found that in practice this assumption was wrong, I should certainly refuse to allow the transfer of actions to this Division or should transfer them if brought here. But in *The Gertrude* (1) there was solely a question of damages to be decided, and the registrar was not fettered by any Act of Parliament. Here, however, I am not left free; I am exercising the jurisdiction arising under Lord Campbell's Act. In that Act it is said that the damages are to be assessed by a jury which is also to apportion them. Neither is there in this case any assent on the part of all parties to the case being decided according to the special practice of this Division; and I am, therefore, bound to send the case to a jury unless there is

(1) 12 P. D. 204.

(2) 12 P. D. 58.

1888

THE
ORWELL.

such consent. Reference has also been made to s. 514 of the Merchant Shipping Act, 1854, but it is sufficient to say that what has been done in regard to cases under that section has been done under the special provisions of that Act. I, therefore, give the interlocutory judgment as prayed, and I direct that the damages shall be assessed and apportioned by a jury. (1)

Solicitors for plaintiffs : *Pritchard & Sons.*

Solicitors for defendants : *Gellatley & Warton.*

E. S. R.

*Feb. 21 ;
March 13, 19.*

[IN THE COURT OF APPEAL.]

THE CELLA.

*Lien—Arrest—Action in rem—Admiralty Court Act, 1861 (24 Vict. c. 10),
s. 4—Time of Attachment of Claim.*

The lien of the plaintiff in an action in rem under s. 4 of the Admiralty Court Act, 1861, takes effect from the moment of the arrest of the ship. Where, therefore, such an action was commenced against a vessel belonging to a limited company, and the company after a warrant of arrest had been served was ordered to be wound up :—

Held, that the official liquidator had no claim to the proceeds of the vessel in the hands of the Court as against the plaintiff.

MOTION to confirm the registrar's report and for payment of money out of Court.

The following statement of the facts is taken from the judgment of the President :—

This case arose out of a claim for repairs and necessities supplied by the plaintiff at Halifax, Nova Scotia, to the ship *Cella* in January, 1885. The master of the ship gave a bill for the amount of the claim (963*l.*) upon the *Cella* Company, the owners, which was accepted by them but dishonoured. An action was brought on this bill against the owners, and judgment was recovered on August 13, 1885, for 974*l.* 11*s.* 2*d.* and costs. Nothing was paid on this judgment.

An action was afterwards brought against the master as drawer

(1) The following decree was entered in the registry :—The President having heard counsel on both sides adjudged that the plaintiffs recover

against the defendants damages to be assessed on a writ of inquiry directed to the sheriff of Middlesex.

of the bill, and judgment was obtained in October, 1885, for 98*l.* 17*s.* 1*d.* with costs. On this judgment 75*l.* 12*s.* 2*d.* only was recovered. 1888
THE CELLA.

On June 8, 1885, while the ship was under arrest in an action by the master for wages and disbursements, the plaintiff commenced an action in rem under s. 4 of the Admiralty Court Act, 1861, against the *Cella*. Wood, the mortgagee of the ship, intervened in this action on June 15, and soon after the following agreement was come to and was embodied in an order of the Court: "Upon agreement of counsel on both sides, and James Mark Wood, the intervener, having by counsel undertaken to pay to plaintiff whatever plaintiff could, if arrest continued, recover from the ship after satisfying all prior incumbrances, it is ordered that the ship *Cella* be forthwith released."

The ship was accordingly released, Wood, the mortgagee, thus becoming liable on his undertaking.

It is not necessary for the present purpose to follow the mortgagee in his subsequent dealings with the ship. But upon an order, or on repeated orders of the Court, the mortgagee at length filed his accounts, which were referred to the registrar. Upon which it was found that, after giving credit for all prior claims and incumbrances, including his mortgage interest, he had in his hands the sum of 937*l.* 0*s.* 2*d.*, the balance of the value of the ship at the time when it was released to the mortgagee in pursuance of his undertaking. The President ordered him to pay this amount into court pending an inquiry as to the exact amount of the plaintiff's claim. This was made by the usual reference, and the plaintiff's claim was ascertained by the registrar and merchants to amount to 819*l.* 8*s.* 10*d.*, and a report to this effect was made by them.

The plaintiff by the present motion applied for the confirmation of the report, and for the payment out to him of this sum with costs against Wood, the mortgagee. The liquidator of the *Cella* Company opposed the application, on the ground that he was entitled to the sum in Court. The *Cella* Company had been ordered to be wound up on August 8, 1885, two months after the vessel had been released, and a liquidator was appointed in October, 1885.

1888

THE CELLA.

Hall, Q.C., and *Stokes*, for the liquidator of the *Cella Steamship Company*, in objection to the motion. The plaintiff is not entitled to have the money paid out to him. He has recovered a judgment for the same debt in the Queen's Bench Division, and he cannot sue the same persons twice: *Cambefort & Co. v. Chapman*. (1) The second action though in rem becomes an action against the owners of the ship if they choose to defend it. Secondly, the plaintiff is not entitled to this money, because he has no maritime lien: *The Two Ellens* (2); *The Heinrich Björn* (3); and so, not being a secured creditor, he cannot resist the claim of the liquidator. Thirdly, he has not had leave of the Chancery Division to sue in this court, which he was bound to obtain under the Companies Act, 1862, s. 87; therefore the liquidator is entitled to the amount paid into Court.

Sir W. Phillimore, and *Aspinall*, for the plaintiff. The plaintiff is entitled to have this money paid out to him and to have the costs paid by Wood, the mortgagee. The case of *Cambefort & Co. v. Chapman* (1) does not apply, for it was a case of co-contractors. There are numerous cases which shew that a claimant can obtain a judgment in personam and one in rem arising out of the same cause of action: *The Bengal* (4); *The Orient* (5). Secondly, a claimant who seizes a ship under the Admiralty Court Act, 1861, s. 4, creates an incumbrance on it which, from the moment of the seizure, gives him a right to the proceeds as against the owner: *The Two Ellens* (2); *The Heinrich Björn* (3); *The Pieve Superiore*. (6) The liquidator is in the same position as the owner. Thirdly, the Companies Act does not debar the plaintiff from suing, for the action was begun before the winding-up proceedings took place.

[They referred to *In re Rio Grande Do Sul Steamship Co.* (7)]

Myburgh, Q.C., and *Roscoe*, for the mortgagee. The sum of 937*l.* 0*s.* 2*d.* was paid by the mortgagee to represent the balance of proceeds of the vessel after the deduction of the mortgagee's own claim and what he had paid for wages to the master. The

(1) 19 Q. B. D. 229.

(2) Law Rep. 4 P. C. 161.

(3) 10 P. D. 44.

(4) Swa. 468.

(5) Law Rep. 3 P. C. 696 (702).

(6) Law Rep. 5 P. C. 490.

(7) 5 Ch. D. 282.

plaintiff would, therefore, have a right against this sum for his claim and costs, but not against the mortgagee personally.

1888

THE CELLA.

Phillimore, in reply.

Cur. adv. vult.

March 13. THE PRESIDENT [after stating the facts as already set out, proceeded :—] I am of opinion that the liquidator is not entitled to oppose the payment of the plaintiff's claim out of the money paid into Court by the defendant Wood. That payment, so far as it was applicable to the discharge of the plaintiff's claim, was made in fulfilment of Wood's undertaking, with which neither the liquidator nor the insolvent company had anything to do. At the time that undertaking was given the plaintiff had a lien on the ship by virtue of the proceedings he had instituted against it. It was not, indeed, a maritime lien, which arises at the moment the claim comes into existence, but it was a security arising at the commencement of this action in rem. This distinction appears to me to be fully recognised by the judgments in the cases of *The Two Ellens* (1), *The Pieve Superiore* (2), and *The Heinrich Björn*. (3) The right of the plaintiff as against Wood must be determined by the rights which the plaintiff had against the ship at the time she was released, and the subsequent history of the ship and of the owners is irrelevant for the purpose of this inquiry.

It was further contended for the liquidator that the judgments recovered against the company and the master in the action on the bill of exchange precluded the present claim, but if this were an action against the ship an unsatisfied judgment in personam is no bar to proceedings in rem. But the order which I am asked to make is not in an action against the ship or against the company but against Wood. The same answer applies to the argument that no action can be against the company without leave of the Court.

I order, therefore, that the amount of the plaintiff's claim, with interest, be paid out to him as prayed, and I condemn the defendant Wood in costs. I also condemn the liquidator in the costs occasioned by his intervention.

March 19. The official liquidator and the mortgagee appealed.

(1) 4 P. C. 161, at p. 168.

(2) Law Rep. 5 P. C. 491.

(3) 10 P. D. 44.

1888

THE CELLA.

Stokes, (*Barnes*, Q.C., with him), for the appellants, repeated the arguments urged in the court below, and also argued that any expressions of the Court in *The Two Ellens* (1) and *The Pieve Superiore* (2), other than those as to the effect of s. 5 of the Admiralty Court Act, 1861, were obiter dicta.

Aspinall, for the respondent. The rights of the plaintiff relate back on judgment being pronounced in his favour to the time of the commencement of the action. This is so in all cases where anything is held by the Court, and it has been so decided in bankruptcy cases by this Court: *Ex parte Banner*, *In re Keyworth* (3); *Ex parte Bouchard*, *In re Moojen*. (4) [He was then stopped.]

Stokes, in reply.

LORD ESHER, M.R. This case seems to be decided by authority. The question to be decided arises under the Admiralty Court Act of 1861, and is whether the plaintiff by virtue of the judgment which has been given for the amount found to be due to him is entitled to be paid out of the proceeds of the ship, which were paid into Court in order to obtain the release of the vessel. It is true that in respect of the repairs done by the plaintiff there was no maritime lien, but the Admiralty Division, nevertheless, has jurisdiction over such a claim as this, and by s. 35 of the Admiralty Court Act, 1861, that jurisdiction may be exercised by proceedings in rem, as was done in this case. As regards a maritime lien the Admiralty Court, and now the Admiralty Division of the High Court enforces it in an action in rem by seizing the ship. And it does so in order to enable the person who alleges he has a right against the ship to realize that right. Now the jurisdiction given to the Admiralty Division by the Act in question can, as I have said, be exercised by an action in rem, that is to say, upon the production of a proper affidavit, a warrant of arrest is issued and under it the marshal may seize the ship, and the Court will adjudicate upon it. Possession is taken by the marshal in order that the ship may be sold, and that the rights of the plaintiff may be satisfied out of the ship. These rights must

(1) Law Rep. 4 P. C. 161.

(2) Law Rep. 5 P. C. 482.

(3) Law Rep. 9 Ch. 379.

(4) 12 Ch. D. 26.

exist before the ship is seized, for the Court adjudicates upon the ship on the ground that it had jurisdiction to seize it and realize it for the plaintiff, on account of something which happened before the seizure, which in this case was repairing her. Even without the cases cited for the plaintiff, it would seem to me to be clear that whatever may be the judgment of the Court it must take effect from the time of the writ. The judge is to enforce the writ, and to determine the rights of the parties at the time the writ is served. That is so, as it seems to me, in every action. But in every action we may have bankruptcy and I know not what intervening, so that when judgment is given it cannot be effectually carried out. But if the money be in court, or the Court has possession of the res, it can give effect to its judgment as if it had been delivered the moment after it took possession of the res. It is contrary to the principle of these cases and to justice that the rights of the parties should depend not upon any act of theirs but upon the amount of business which the Court has to do. Therefore the judgment in regard to a thing or to money which is in the hands of the Court, must be taken to have been delivered the moment the thing or the money came into the possession of the Court. In addition to the two cases cited for the plaintiff, there are also the Admiralty cases of *The Two Ellens* (1), *The Pieve Superiore* (2), and *The Heinrich Björn* (3), which are undoubtedly based on the same rule as the two bankruptcy cases, and they shew that though there may be no maritime lien, yet the moment that the arrest takes place, the ship is held by the Court as a security for whatever may be adjudged by it to be due to the claimant. Further, it is to be borne in mind that in the Admiralty Division, in an action in rem, the effect of the judgment is greater than it can be in another Division of the High Court, where money has been paid into Court. In the one case it is only a judgment between the parties, in the other it is a judgment between the parties and against all the world, and cannot be disputed. I, therefore, am of opinion that the appeal must be dismissed with costs.

1888

THE CELLA.

Lord Esher, M.R.

(1) Law Rep. 4 P. C. 161.

(2) Law Rep. 5 P. C. 482.

(3) 11 App. Cas. 270.

1888

THE CELLA.

FRY, L.J. I am of the same opinion. We have to inquire what are the rights of the parties under the Admiralty Court Act, 1861. It appears to me that so long as 1842 Dr. Lushington, in *The Volant* (1), explained the principle upon which the Court proceeds, when he said that “an arrest offers the greatest security for obtaining substantial justice, in furnishing a security for prompt and immediate payment.” The arrest enables the Court to keep the property as security to answer the judgment, and unaffected by chance events which may happen between the arrest and the judgment. That is Dr. Lushington’s decision, and I think it is a right one. When the legislature came to deal with the matter in 1861, there is no sign of dissent from the explanation previously given by Dr. Lushington, and recent decisions are in accordance with his judgment. The cases of *The Two Ellens* (2), *The Pieve Superiore* (3), and *The Heinrich Björn* (4) contain decisions which are accurate enough according to that judgment, and which are accurate if the appellant’s contention is correct. It is clear, too, that the decision of the President in this case is in accordance with the decisions of other Courts. Lastly, it is in conformity with what has been the uniform practice of the Admiralty Court—that the effect of the arrest is to provide security for the plaintiff for the sum which he claims.

LOPES, L.J. From the moment of the arrest the ship is held by the Court to abide the result of the action, and the rights of parties must be determined by the state of things at the time of the institution of the action, and cannot be altered by anything which takes place subsequently. The two cases cited on behalf of the respondent appear to me to be very analogous to that before us, and these and our present decision are in entire accord with the *The Two Ellens* (2) and other Admiralty cases.

Appeal dismissed.

Solicitors for plaintiff: *Botterell & Roche.*

Solicitors for liquidator of the *Cella Steamship Company*: *Stokes, Saunders, & Stokes.*

Solicitors for mortgagee: *Wynne, Holme, & Wynne.*

(1) 1 W. Rob. 383.

(2) Law Rep. 4 P. C. 161.

(3) Law Rep. 5 P. C. 482.

(4) 11 App. Cas. 270.

E. S. R.

BIGWOOD v. BIGWOOD.

1888

April 13.

Divorce—Decree for Restitution of Conjugal Rights—Refusal to obey—Desertion—Adultery previous to Decree revived—47 & 48 Vict. c. 68, s. 5.

In a petition by a wife for divorce on the ground of adultery and desertion it appeared that the husband had failed to comply with a decree for restitution of conjugal rights, and that he had also been guilty of adultery before the date of the decree:—

Held, that sufficient proof of adultery and desertion had been given to satisfy s. 5 of the Matrimonial Causes Act, 1884, and that the wife was entitled to a decree for divorce.

PETITION for divorce on the grounds of adultery coupled with desertion, the desertion being neglect to comply with an order for the restitution of conjugal rights.

The parties were married September 28, 1879, and cohabited together at Balham and other places for several years, there being three children issue of the marriage.

In October, 1886, the respondent commenced to occupy a separate room, and in 1887, when the petitioner went to live at Margate on account of her health, he refused to go with her or to visit her there, and had never since lived with her or communicated with her, except on one occasion in reference to the vaccination of the youngest child.

On July 15, 1887, a petition was presented to the Court praying for restitution of conjugal rights, and on October 28, 1887, a decree was pronounced ordering the respondent within fourteen days after the service of the order to return home to the petitioner and render her conjugal rights.

A copy of this decree was served on the respondent personally on November 2, 1887, but he never complied with it, and has not returned to cohabitation. The present petition was for a dissolution of the marriage on the ground of adultery and cruelty, and was presented January 7, 1888. The respondent did not appear or answer.

Proof was given of adultery committed at the Burlington Hotel, Eastbourne, on May 7 and 8, 1887.

Middleton, for the petitioner:

1888

BIGWOOD
v.
BIGWOOD.

THE PRESIDENT. I am of opinion that s. 5 of the Act of 1884 places the desertion which arises on a disobedience to a decree for restitution of conjugal rights on the same footing as desertion for two years, with all its consequences, and it may be coupled with adultery either before or after the decree of restitution. The petitioner, therefore, is entitled to the relief which she asks, and I pronounce a decree nisi.

Solicitors: *Piesse & Sons.*

W. L.

April 13.

SKINNER v. SKINNER.

Divorce—Order depriving Parent of Custody of Children—Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 7.

In a suit by the wife for divorce on the ground of adultery coupled with cruelty, which was of an aggravated character, the Court, after pronouncing a decree nisi, made an order under s. 7 of the Guardianship of Infants Act, 1886, declaring the respondent, who did not appear to oppose the application, to be an unfit person to have the custody of the children.

THIS was a petition by a wife praying for a dissolution of the marriage on the grounds of her husband's adultery and cruelty. The respondent did not appear or answer.

At the hearing the adultery and the cruelty (which consisted in the communication of disease on four separate occasions) were proved, and the President pronounced a decree nisi, and made an order giving the custody of the two children of the marriage to the petitioner.

Bargrave Deane, for the petitioner, applied under s. 7 of the Guardianship of Infants Act, 1886, for a declaration that the respondent was an unfit person to have the custody of his children.

Evidence was given that notice of this application had been personally served on the respondent.

THE PRESIDENT. The operation of this order of course does not arise until after the petitioner's death. There are many cases—I have one before me now—in which a husband though guilty has been allowed to have the custody of the children, of

the marriage, and I can easily conceive that very serious questions may arise under this section. But in this case, as there is no opposition, I make the order prayed. (1)

1888

SKINNER
v.
SKINNER.

Solicitors: *Kingsford, Dorman, & Co.*

W. L.

[IN THE COURT OF APPEAL.]

March 14.

DUNN v. DUNN.

Divorce—Alimony pendente lite—Wife found guilty of Adultery—Divorce Act, 1857 (20 & 21 Vict. c. 85), s. 32.

Where alimony *pendente lite* has been allotted to a wife in a petition for divorce, such alimony ceases upon a verdict finding her guilty of adultery, but the Court may in its discretion make an order for the alimony to continue.

Decision of *Butt, J.*, affirmed.

Wells v. Wells (3 Sw. & Tr. 542) discussed.

THIS was a petition by a husband for dissolution of his marriage on the ground of the wife's adultery. The wife also petitioned for a dissolution of the marriage on the ground of adultery and cruelty.

On July 7, 1887, after the commencement of the proceedings, an order was made for alimony pendente lite to the wife at the rate of 62*l.* 10*s.* per month, payable on July 18, 1887, and on the 18th of every subsequent month.

The petitions were tried on February 3, 1888, before Butt, J., and a jury. The jury found all the issues in favour of the husband, and a decree nisi was made for dissolution of the marriage on the husband's petition.

On February 14 notice was given by the wife of her intention to move for a new trial.

The alimony was paid up to January 18, 1888, inclusive. On February 18 the wife with her solicitor called on the husband's

(1) The words of the section are: "In any case where a decree for judicial separation, or a decree either nisi or absolute for divorce shall be pronounced, the Court pronouncing such decree may thereby declare the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children, if any, of the marriage, and in such case the parent so declared to be unfit shall not upon the death of the other parent be entitled as of right to the custody or guardianship of such children."

1888

DUNN
v.
DUNN.

solicitor asking for payment of 62*l.* 10*s.*, as due on that day. The solicitor stated that he was prepared to pay an apportioned part up to February 3, the date of the decree nisi, but nothing more. The wife refused to accept this, and on February 28 applied in chambers for leave to issue a fi. fa. for 62*l.* 10*s.* Butt, J., refused the application, and gave her leave to apply directly to the Court of Appeal.

The appeal was heard on March 14, before which time the application for a new trial had been refused.

Fillan, for the appeal. *Wells v. Wells* (1) decides that alimony pendente lite goes on till the time of applying for a new trial. *Ellis v. Ellis* (2) goes further, and decides that the wife is entitled to alimony till decree absolute. The Court can give permanent alimony even to a guilty wife, and in the case of alimony pendente lite the question turns on whether the parties are still husband and wife—the suit is not at an end till final decree. In *Stanhope v. Stanhope* (3) the status of the wife after decree nisi and before decree absolute is considered.

[LINDLEY, L.J.:—Does not the case turn rather on conduct than on status?]

The power to give alimony arises under the Divorce Act of 1857 (20 & 21 Vict. c. 85), ss. 32 and 17; the rule as to enforcing it is rule 203 of the general rules and regulations. *Jones v. Jones* (4) is in favour of the application.

[COTTON, L.J.:—There the wife had not been guilty of adultery. Is the Court bound to enforce its order whatever the conduct of the wife may be?]

It is not disputed that the Court could stop the alimony, but unless such an order is made the alimony must continue till the decree absolute. The right to apply for a new trial would often be made nugatory if the alimony ceased on decree nisi.

Inderwick, Q.C., and *Middleton*, contra, were not called upon.

COTTON, L.J. This is an appeal from a decision of Butt, J., and the question is whether *Wells v. Wells* (1) lays down a binding rule that, after the verdict of a jury has established the

(1) 3 Sw. & Tr. 542.

(2) 8 P. D. 188.

(3) 11 P. D. 103.

(4) L. R. 2 P. & D. 333.

adultery of a wife, she can as a matter of right claim that alimony pendente lite which has been allowed her shall go on till the period during which a new trial can be applied for has expired. In *Wells v. Wells* (1) there was no motion for a new trial; in the present case a motion for a new trial has been refused. We do not find on inquiry that *Wells v. Wells* (1) has been treated in the Divorce Court as establishing such a general rule as is contended for—that, although the wife has been found guilty, the alimony must go on till the case is finally disposed of. Until adultery has been proved against the wife she is entitled to support, and the Court gives her alimony pendente lite. But when her adultery has been proved, though she is still a wife she has lost that right. Ought not the alimony then to stop at the verdict? The husband here offered to pay alimony up to the time of the verdict, but declined to pay anything further. I think the husband's advisers were right in taking this view. The verdict of the jury establishes the adultery of the wife unless a divisional Court or the Court of Appeal or the House of Lords grants a new trial. The reasonable rule then appears to be that on the jury finding the wife guilty of adultery her right to alimony ceases, subject to this—that if the judge thinks it reasonable so to do he can continue it. Thus, for instance, he may think it not improbable that the wife will obtain a new trial and succeed ultimately in establishing her innocence; in such a case he might well think it reasonable that the alimony should be continued. To hold that alimony continues as a matter of right till an application for a new trial is disposed of, would encourage frivolous applications for new trials.

Ellis v. Ellis (2) was an entirely different case. The wife there took the proceeding against her husband, and she had in no way forfeited her rights against him. The case was one where it would be proper ultimately to grant permanent alimony, and we thought it reasonable that in the meantime she should have intermediate alimony.

LINDLEY, L.J. I am of the same opinion. *Wells v. Wells* (1) admits the principle that where the wife is satisfactorily proved to

1888

DUNN
v.
DUNN.

(1) 3 Sw. & Tr. 542.

(2) 8 P. D. 188.

1888

DUNN
v.
DUNN.

have been guilty of adultery her alimony ceases; but in that case the judge thought that her adultery could not be considered as satisfactorily proved while she could apply for a new trial. It seems anomalous that the right should continue when a jury has found her guilty. If the verdict is against her the onus must lie upon her to shew that the alimony ought to be continued. The judge ought to have power to give it to her, but I think it would be wrong to hold that without further order it continues after an adverse verdict.

BOWEN, L.J. The President, with whom we have conferred, is of opinion that the rule we are laying down is the proper rule, and that, *Wells v. Wells* (1) notwithstanding, we are not deviating from what has been considered to be the rule of practice in the Divorce Court.

Appeal dismissed.

Solicitor for husband: *T. Allingham.*

Solicitors for wife: *Thomas Beard & Sons.*

H. C. J.

May 1.

BLACKHALL v. BLACKHALL AND CLARKE (THE QUEEN'S PROCTOR INTERVENING).

Divorce—Intervention of Queen's Proctor—Costs—20 & 21 Vict. c. 87, s. 34; 23 & 24 Vict. c. 144, s. 7.

The Court refused to condemn a co-respondent who had not been dismissed from the suit in the costs of an unsuccessful intervention by the Queen's Proctor under 23 & 24 Vict. c. 144, s. 7.

APPLICATION to condemn a co-respondent in the costs of an intervention by the Queen's Proctor which had been dismissed.

This was originally a suit instituted by the husband for a dissolution of the marriage on the ground of his wife's adultery with the co-respondent. The respondent and co-respondent pleaded connivance and conduct conducing to the adultery, but no evidence was offered on these issues at the hearing, and on May 25, 1887, Butt, J., who tried the case without a jury, pronounced a decree nisi dissolving the marriage.

In October, 1887, the Queen's Proctor obtained leave to inter-

(1) 3 Sw. & Tr. 542.

vene, and on November 7, 1887, he filed his plea, praying that the decree nisi be rescinded and the petition dismissed on the grounds of connivance and the suppression of material facts at the hearing.

1888
BLACKHALL
v.
BLACKHALL
AND CLARKE.

The case was heard on March 27 before Butt, J., who found all the issues in favour of the petitioner and dismissed the intervention, but declined to condemn the Queen's Proctor in costs.

Deane, moved to condemn the co-respondent in the costs. The 34th section of the Divorce Act empowers the Court to order the co-respondent "to pay the whole or any part of the costs of the proceeding." These costs are costs in proceedings caused by the misconduct of the co-respondent.

[BUTT, J. In *Crawford v. Crawford and Dilke* (1) it was held that he was no party to the intervention, and how can he then be condemned in costs?]

There he had been dismissed from the suit and allowed his costs before the intervention. A co-respondent is no party to a proceeding for variation of settlements, but yet he is ordered to pay the costs of it: *Gill v. Gill and Hogg*. (2)

[BUTT, J. Is there any case in which a co-respondent has applied to appear and has been refused leave?]

It has been the universal practice to make these orders in his absence, and to tax the costs against him.

Clay, for the co-respondent. The application is an entirely novel one. It is against the principles of natural justice that a man should be condemned in the costs of a proceeding in which he is not allowed to appear, and over which he can have no control. If it had been intended that such a power should be exercised by the Court it would have been laid down in express terms, but there is not a word in the statute conveying an intimation that a person who has not been heard and who has not appeared in the proceeding should be condemned in the costs. The 34th section of the Matrimonial Causes Act of 1857 relied on cannot have been intended to apply to the costs of an intervention, because the Queen's Proctor could not intervene before the passing of the 23 & 24 Vict. c. 144, three years after.

(1) 34 W. R. 677.

(2) 33 L. J. (P. D. & A.) 43.

1888

BLACKHALL
v.
BLACKHALL
AND CLARKE.

Deane, in reply. The power to vary settlements was not conferred on the Court by the original Act, but by the 22 & 23 Vict. c. 61. [He referred also to 41 Vict. c. 19, s. 2, as giving the Court discretion to make such order as it thought fit in regard to the costs of a Queen's Proctor's intervention.]

BUTT, J. In this case, which came before me originally as a suit for dissolution, I arrived at the conclusion that the co-respondent and respondent had committed adultery, and I pronounced a decree nisi with costs against the co-respondent. Then followed the Queen's Proctor's intervention, which was also tried before me, and I came to the conclusion that there had been no connivance; but in dismissing the Queen's Proctor's intervention I made the remark that as it had been brought about mainly by the co-respondent he ought to pay the costs. The question which arises on this application is, have I the power to condemn him in the costs? It is admitted that I have no power unless it be a statutory power, but it is contended that under the 34th section of the Matrimonial Causes Act of 1857 I have that power. The section says that where the adulterer has been made a co-respondent and the adultery has been proved the Court shall have power to order him "to pay the whole or any part of the costs of the proceedings," and it is contended that the intervention of the Queen's Proctor and the trial which ensues thereon are part of the proceedings in the suit. There is a great deal to be said in favour of that contention, but there is also a good deal to be said on the other side. One thing is clear, that when the statute imposed on the co-respondent the penalty of paying costs it could not have contemplated making him pay the costs of the Queen's Proctor's intervention, because that intervention did not then exist. It was only under a subsequent statute that the Queen's Proctor was authorized to come in in the manner to which we are now accustomed. That being so, ought I to say that although this was not contemplated by the legislature, yet that practically and virtually the power has been given by subsequent Acts incorporating the original Act. I do not think I ought, and for this reason. Whether the proceedings which ensue on the appearance of the Queen's Proctor are proceedings

in the case or not, the co-respondent never does appear in them. I infer from the fact that a co-respondent never has been a party to a Queen's Proctor's intervention that he has not the right to appear. That being so, I think it would be unjust to condemn him in the costs of a proceeding over which he has and can have no control. There is no precedent for such an order, and although I regret it in this particular case, I am unable to condemn him in costs. The application must be refused, but I shall not give him the costs of this motion.

1888

BLACKHALL
v.
BLACKHALL
AND CLARKE.

Solicitor for petitioner: *Hardingham.*

Solicitor for co-respondent: *Vanderpump.*

W. L.

ferred to. BEKEN v. |
KEN. |
[1948] P. 302 |

DREW v. DREW.

April 17;
May 8.

Divorce—Desertion—Husband sentenced to Penal Servitude.

In a wife's suit for dissolution on the ground of adultery and desertion, it appeared that the respondent when he left his wife stated to her that he was going to Ireland for a week's shooting, but in fact he went to Australia to escape arrest on a charge of embezzlement. Up to the time of his flight he had been carrying on an adulterous intercourse with a woman with whom he had made arrangements to go away, and he was found living in adultery with another woman at Sydney. Subsequently he was brought back to this country in custody, tried, and sentenced to ten years' penal servitude:—

Held, that the circumstances under which the respondent left his wife constituted desertion, and that the desertion would continue notwithstanding the fact that he was brought back to this country in custody and prevented by his imprisonment from returning to his wife.

PETITION by the wife for dissolution of marriage on the ground of adultery coupled with desertion.

The parties were married in 1870, and cohabited together in various places in and near London until January 6, 1886, when the respondent left his wife telling her that he was going to Ireland for a week's shooting.

It appeared that the respondent, who was a solicitor, had been guilty of embezzlement of certain funds entrusted to him. Instead of going to Ireland he absconded to New South Wales, where he was arrested at Sydney by a detective officer sent from this country and brought back in custody. In November, 1886,

1888

DREW
v.
DREW.

he was tried at the Central Criminal Court, found guilty and sentenced to ten years' penal servitude.

The adultery was committed with a foreign woman whom he was in the habit of visiting up to January, 1886, under the name of Mr. Adair, excusing his absences to his wife on the plea of business out of town. In the evidence of this woman taken on commission she stated that before his flight the respondent had proposed to her to go on a trip to Constantinople, and had actually taken return tickets and provided an outfit for her, which she marked with the name of "Adair."

When he was arrested at Sydney the respondent was living with another woman, who came down to the ship when he was in custody, and took an affectionate leave of him.

The case was heard before the President without a jury. The respondent had not filed an answer.

Inderwick, Q.C. (Searle, with him), for the petitioner.

Mrs. Drew in her evidence stated that she was entirely unaware of her husband's defalcations, and of his intention to leave the country. She believed that he was going to Ireland on a short visit, as he alleged. She had never received any communication from him after he left, and she had written letters to the address he gave in Ireland, which had been returned to her. She did not know the truth until she went to her husband's father to ask whether he knew what had become of him. She had no suspicion that he was carrying on an adulterous intercourse—having always placed full trust in his assurances that his absences were caused by business engagements.

THE PRESIDENT. I shall not give any opinion on the case now, because it is possible that it may be strengthened by the evidence of the respondent's father, but for the guidance of the parties I may say that I think that if a man leaves his wife under circumstances which would make his absence amount to a desertion if continued for two years, the fact that he has been brought back in custody will not prevent the two years running. It depends upon the character of the leaving.

The further hearing of the cause was then adjourned, and

resumed on May 8, when Mr. Drew, the respondent's father, was called, and stated that he had no knowledge of his son's intention to leave the country, and only heard of it and of the offence which he had committed some days after his flight.

1888

DREW
v.
DREW.

THE PRESIDENT. On the former occasion I stated that I had to determine the rights of the parties upon a consideration of what were the circumstances at the time this man left his wife, and that if these led me to the conclusion that he intended to desert her the fact that he was afterwards brought back to this country in the custody of the police and unable to return to her would make no difference. A desertion begun would continue notwithstanding the fact that his imprisonment would have prevented his return to her. To that opinion I adhere. I have now to consider whether when he parted from his wife on January 6, 1886, he deserted her. In coming to a conclusion on that point I must take into consideration the whole of his conduct. Not unfrequently one comes to the conclusion that when a man has left his wife and cohabited with some other woman, treating her as his wife, the fact that he has not returned to his wife and given her the opportunity of living with him explains his conduct and attaches to it the character of desertion. In this case when I adjourned the hearing on the former occasion the effect of this class of evidence was not present to my mind, but it may have a bearing on the question I have to decide. It is proved that the respondent told his wife a false story—that he was going to Ireland to shoot for a week. He did not tell her that those whom he had defrauded would be in pursuit of him and that he would be put on his trial. The next fact of importance is that he contemplated taking another woman away with him. This woman says that they continued to meet until the month of January, 1886—that he had proposed to her to take her away with him travelling in the name by which he was known to her, and that she had her linen marked with the initials of that name. Though he was obliged to fly from his creditors that does not exclude the idea that he also intended to desert his wife. I think the fact that he had made these arrangements with another woman to go away with him and live with him as

1888
DREW
v.
DREW.

his wife, shews that besides the motive for avoiding those who would be in pursuit of him on a criminal charge he had the intention at the same time of deserting his wife. That inference is not altered by the fact that when he got over to Australia he seems to have broken his promise to this woman, and there is the further evidence of his intention to abandon his wife in this, that the detective officer who arrested him found him consorting with some other woman, who came down to the ship and took leave of him with many demonstrations of affection. I think, therefore, that the evidence leads to this conclusion—that at the time he endeavoured to avoid being arrested he also availed himself of that opportunity to desert his wife. There will therefore be a decree nisi with the custody of the children to the petitioner.

Solicitors : *Morice, Toller, & Blakesley.*

W. L.

June 3.

[BEFORE A DIVISIONAL COURT—LORD COLERIDGE, C.J., and THE PRESIDENT.]

TAPLIN *v.* TAPLIN AND HOLLAND.

Divorce—Practice—New Trial—Misdirection—Insufficient Statement of Grounds in Notice—Order XXXIX., r. 3.

Order XXXIX., r. 3—which requires that when a new trial is applied for on the ground of misdirection the particulars of the alleged misdirection should be specifically stated in the notice—is applicable to proceedings in a divorce suit.

Murfett v. Smith (12 P. D. 116) followed.

MOTION for a new trial on the grounds of misdirection and that the verdict was against the weight of evidence.

The petition was presented by the husband, and prayed for a dissolution of the marriage by reason of the adultery of his wife with the co-respondent. At the hearing, April 26 and 27, the jury found all the issues for the respondent and co-respondent, and Butt, J., dismissed the petition with costs.

The notice of motion was in the following terms:—"Take notice that the Court will be moved to order a new trial of the issue whether Susannah Taplin committed adultery with James Holland, ... on the ground that the verdict was against the

weight of evidence, ... and also on the ground of misdirection, the absence of proper and complete direction to the jury generally as to the evidence applicable to the said issues, and the rejection of evidence," &c.

1888

TAPLIN

v.

TAPLIN

AND

HOLLAND.

Shearman, for the co-respondent, submitted as a preliminary objection that the notice as to misdirection was insufficient. By Order xxxix., r. 3, it is required that the specific grounds on which misdirection is alleged shall be stated in the notice.

[He cited *Murfett v. Smith*. (1)]

Walter, for the petitioner. That rule applies only where specific misdirection as to particular facts is relied on, not where, as here, a general misdirection is alleged.

[He referred to *Toulmin v. Hedley* (2), and *Lord v. Wardle*. (3)]

THE COURT held that *Murfett v. Smith* (1) must be followed, and that the rule requiring that the grounds on which misdirection is alleged should be specified in the notice for a new trial is as applicable to divorce proceedings as to suits in the Probate Court.

Motion dismissed.

Solicitors for petitioner: *Maynard & Son*.

Solicitors for co-respondent: *Hare & Co*.

(1) 12 P. D. 116.

(2) 2 C. & K. 157.

(3) 3 Bing. N. C. 680.

W. L.

1888

April 11.

[IN THE COURT OF APPEAL.]

DAINTREE *v.* BUTCHER AND FASULO.

Will and Codicil—Execution—Acknowledgment of Testator's Signature—
Wills Act, 1837 (1 Vict. c. 26) s. 9.

A testatrix exhibited a codicil to her last will, which was entirely in her own handwriting, to one of the attesting witnesses, telling her she had something which required two witnesses. Subsequently, the second attesting witness having come into the room was asked, either by the testatrix or by the other attesting witness in her presence, to sign it, and they both signed, but the testatrix did not tell them that it was a testamentary paper, nor did they know what sort of paper it was that they had attested. They did not recollect seeing the testatrix sign, but one of them was clear that her signature was there at the time they signed :—

Held, affirming the decision of Butt, J., that this was a sufficient acknowledgment by the testatrix of her signature, and that the codicil was entitled to probate.

APPEAL by the plaintiffs from a decision of Butt, J. (reported ante, p. 67).

Bayford, Q.C., and *Barnard*, for the plaintiffs. It does not clearly appear that the attesting witness, Miss Whympers, was asked by or in the presence of the testatrix to witness the testamentary paper, and if she was not so asked there could be no acknowledgment to her of the signature. *In the Goods of Thompson* (1), which was relied on by the defendants, was a decision on an ex parte application and so is not entitled to great weight. In *Pearson v. Pearson* (2) Lord Penzance treats it as overruled by *Ilott v. Genge*. (3) *Blake v. Blake* (4) is distinguishable.

Inderwick, Q.C., and *Middleton*, for the defendants, were not called upon.

COTTON, L.J. In this case it is not disputed that the signature of the testatrix is upon the codicil in question, and it is not disputed that it was written there before the witnesses came into the room. The two witnesses, in the presence of the testatrix, signed their names below her signature, which was so placed that

(1) 4 Notes of Cases, 643.

(3) 4 Moo. P. C. 265.

(2) Law Rep. 2 P. & D. 451.

(4) 7 P. D. 107.

they could have seen it. The evidence of the attesting witness, Miss Whympers, shews that she knew she was asked to sign as a witness. It is said that she was only asked to sign before she came into the room, and that this was not a request by the testatrix amounting to acknowledgment of the signature. If this was to be relied upon, the cross-examination ought to have been directed to it, but nothing of the kind was done, and as the evidence stands, though it is not as clear as might be wished, I think it must be taken that the other attesting witness, Miss Hepburn, after Miss Whympers had come in, and in the presence of the testatrix, asked her to sign as witness. Now it is admitted law that it is not necessary for the testator to say "this is my signature," but if it is placed so that the witnesses can see it, and what takes place involves an acknowledgment by the testator that the signature is his, that is enough. In my opinion, when the paper bearing the signature of the testatrix was put before two persons who were asked by her or in her presence to sign as witnesses that was an acknowledgment of the signature by her. The signature being so placed that they could see it, whether they actually did see it or not, she was in fact asking them to attest that signature as hers.

Now as to the authorities: *In the Goods of Thompson* (1), if good law, is decisive in favour of there having been a good acknowledgment. Is that decision overruled by or contrary to any other decisions? I think not. The case of *Ilott v. Genge* (2) has been treated as inconsistent with it, but in that case the facts were entirely different. The paper there was so folded that the witnesses could not see the signature. It was said, however, that the judgment of the Lord Chancellor in that case lays down a principle inconsistent with *In the Goods of Thompson*. (1) But his Lordship's remarks must be construed with reference to the circumstances of the case before him. What he said was, "We are of opinion that the mere circumstance of calling in witnesses to sign without giving them any explanation of the instrument they are signing, does not amount to an acknowledgment of the signature by a testator." No doubt, if they cannot see the signature, the mere calling on them to sign as witnesses is not enough.

1888
DAINTREE
v.
BUTCHER
AND FASULO
Cotton, L.J.

(1) 4 Notes of Cases, 643.

(2) 4 Moo. P. C. 265.

1888
 DAINTREE
 v.
 BUTCHER
 AND FASULO.
 Cotton, L.J.

But here there was a signature on the paper which they could have seen, and which the testatrix would suppose that they did see. In *Pearson v. Pearson* (1) Lord Penzance took time to consider his judgment in consequence of the decision in *In the Goods of Thompson*. (2) But in *Pearson v. Pearson* (1) there was no evidence that there was any signature on the will when the witnesses signed, and the contention there must have been that the mere asking persons to sign as witnesses is enough without any statement that the document was a will and without any proof that there was a signature upon it. This the Court negatived, but that decision was quite consistent with *In the Goods of Thompson* (2), and I do not think that Lord Penzance meant to say that the decision in *Ilott v. Genge* (3) was inconsistent with anything said in *In the Goods of Thompson* (2). In *Blake v. Blake* (4) the circumstances were quite different from those of the present case, and the Court only affirmed the proposition laid down in *Jarman on Wills* (5): "There is no sufficient acknowledgment, unless the witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by them is his will." The question there dealt with was whether an acknowledgment by the testator that the paper was his will was enough without the witnesses having any opportunity of seeing the signature. Here the witnesses could have seen it.

FRY, L.J., and LOPES, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Hepburn, Son, & Cutcliffe.*

Solicitors for defendants: *Storey & Cowland, for Hepburn & Davison.*

(1) Law Rep. 2 P. & M. 451.

(3) 4 Moo. P. C. 265.

(2) 4 Notes of Cases, 643.

(4) 7 P. D. 102.

(5) 4th ed. p. 108.

[IN THE COURT OF APPEAL.]

THE GERTRUDE.
THE BARON ABERDARE.

1888

March 15,

17, 26.

Interest—Damages—Action tried in Admiralty Division as Branch of High Court—Action transferred to Admiralty Division—Judicature Act, 1873, ss. 16, 24, sub-s. 6, Order XLIX, r. 3.

In an action in the Admiralty Division, which could not, prior to the Judicature Acts, have been tried in the Admiralty Court, the defendant made no objection to the jurisdiction, and interest was, according to the practice in the Admiralty registry, allowed on the assessed damages from the time when the plaintiffs' claim arose.

In another action transferred by consent, after verdict for the plaintiff, to the Admiralty Division for the assessment of the damages by the registrar and merchants, the same practice was followed in regard to the interest.

Held, affirming the decision of the President (12 P. D. 204), that interest on the damages was properly awarded by the registrar on the ground that the parties, in both cases, having proceeded on the understanding that the Admiralty practice should apply, had impliedly consented to abide by such practice.

Per FRY, L.J. Under s. 24, sub-s. 6, of the Judicature Act, 1873, and in the absence of consent to the contrary, a common law action tried in, or transferred to, another Division is to be determined on the same common law principles as would have been applied to it in the Queen's Bench Division.

March 15. APPEALS by defendants from a decision (1) of the President of the Probate, Divorce, and Admiralty Division, confirming two reports of the registrar of the Admiralty Division, allowing (*inter alia*) interest on the amount of the damages awarded to the plaintiffs.

THE GERTRUDE.

In this case interest at 4 per cent. per annum had been allowed by the registrar from the date when the damage to the plaintiffs' cargo occurred, that is, from the time of the stranding of the defendants' vessel. As appears from the report in the Court below (1), the action could not, before the Judicature Acts, have been tried in the Admiralty Court, but no objection was taken by the defendants to the jurisdiction, and the defendants having admitted liability, the assessment of damage was referred to the registrar and merchants.

(1) 12 P. D. 204.

1888

THE BARON ABERDARE.

THE
GERTRUDE.THE BARON
ABERDARE.

This action had been commenced in the Queen's Bench Division by the owners of the *Baron Aberdare* against the London and St. Katharine's Dock Company, for damages sustained by that vessel through the negligence of the dock company in mooring her, and, after verdict for the plaintiffs the action was, under Order XLIX., r. 3, and with the consent of the parties, ordered to be transferred to the Admiralty Division for the assessment of the damages by the registrar and merchants. The parties subsequently came to an agreement that the sum to be awarded by the registrar should be 7500*l.*, and on this sum, in accordance with the practice in the Admiralty registry, interest was added at the rate of 4 per cent. per annum from the date when the damage was sustained until payment.

Hurst (*Barnes*, *Q.C.*, with him), for the appellants (the defendant dock company). This is an ordinary action for negligence, and having been commenced in the Queen's Bench Division, the plaintiffs are not entitled to recover more than they would have obtained had the action proceeded to final judgment in that Division. The object of the transfer was to bring the assessment of the damages before a tribunal conversant with the particular class of inquiry involved, viz., damage to a ship. It was not intended that the plaintiffs should obtain an additional advantage from the practice which prevails in the Admiralty registry of allowing interest on the damages awarded, as opposed to the procedure in the Queen's Bench Division, by which interest from the date of the loss is not added to the sum recovered in the action.

The case stood over for the argument in the case of the *Gertrude*.

March 17. *Barnes*, *Q.C.*, and *Hurst*, for the appellants, the owners of the *Gertrude*, argued as in the Court below that this being a common law action, the common law rule applied which only gave the plaintiffs, as damages, the value of the goods at the time of the loss. The Admiralty Court will follow the

common law rules in cases which are governed by common law principles: *The St. Cloud*. (1) As to the practice to be followed in each Division of the High Court, see p. 491 of *Lyell v. Kennedy*. (2) [The rest of the argument sufficiently appears from the judgment of Lord Esher, M.R.]

Stubbs, (*Sir Walter Phillimore*, with him), for the respondents, the owners of the cargo laden in the *Gertrude*. If a jury had been impanelled in the Admiralty Court for the trial of the issue in this action, the amount of the damages would still have been assessed by the registrar and merchants, and therefore the same result would have followed in respect of the allowance of interest. The principle underlying the practice is that of *restitutio in integrum*, and therefore something more is due to the injured party than the mere value of the property lost. This principle is observed at common law, as in the case of the *British Columbia Saw Mills Co. v. Nettleship* (3), where 5 per cent. interest was added to the value of machinery from the time of its loss until such time as the owner could be expected to have been able to supply himself with other similar machinery.

Hollams, for the respondents, the owners of the *Baron Aberdare*. The justice of the case is not satisfied unless there is an indemnity, and, for this purpose, interest must be added. In *The Northumbria* (4) interest was allowed as being just and equitable, and it is this equitable rule, based on its equitable jurisdiction, which has led to the practice in the Admiralty registry: *Smith v. Kirby*. (5) The registrar stands in an analogous position to an arbitrator, who may now award interest.

Cur. adv. vult.

March 26. LORD ESHER, M.R. In the case of the *Baron Aberdare* the action might have been brought in the Admiralty Division, but was in fact tried in the Queen's Bench Division. It was then, after judgment, by a consent order, transferred to the Admiralty Division for the assessment of damages, and so came before the registrar assisted by merchants. In the case of

(1) 1 Br. & L. 4.

(2) 20 Ch. D. 484.

(3) Law Rep. 3 C. P. 499; 37 L. J. (Ch.) 235.

(4) Law Rep. 3 A. & E. 6.

(5) 1 Q. B. D. 131.

1888

THE
GERTRUDE.
—
THE BARON
ABERDARE.

1888

THE
GERTRUDE.THE BARON
ABERDARE.

Lord Esher, M.R.

the *Gertrude* the action could not, before the Judicature Acts, have been tried in the Admiralty Division, but must have been taken in one of the Common Law Courts. It was, however, brought in the Admiralty Division, and it was stated to us that as the President and Butt, J., had decided not to transfer such actions even if application were made to them, no objection was taken by the defendant to the jurisdiction.

In both cases the registrar, in accordance with the practice which has existed for many years in the Admiralty Court, awarded interest on the damages from the time the injury occurred. To this award of interest objection has been taken, on the ground—in the case of the *Baron Aberdare*—that the action having been tried in the Queen's Bench Division, the rule applicable at common law to the assessment of damages should be followed, and—in the case of the *Gertrude*—that as the action could only be tried in the Admiralty Division, as a branch of the High Court of Justice, the practice as to the assessment of damages which belonged to the peculiar jurisdiction of the old Court of Admiralty could not be applied, and therefore in this case also the common law should have been followed. The argument therefore is that, as in both cases, damages by way of interest could not *eo nomine* be given in the Queen's Bench Division, they ought not to have been so given in the Admiralty Division. It has been further urged that, assuming these were Admiralty cases, the practice in the Admiralty Division of awarding interest *eo nomine* on the amount of the assessed damages is wrong, and should be overruled, and the practice assimilated to that in the Queen's Bench Division, but to this latter argument I cannot accede, because it does not seem to me that there is anything unjust in the mode in which the Admiralty Court has always assessed the damages. On the contrary, I am inclined to think that it is more just than the common law rule, and in the case of *The Khedive* (1) Lord Selborne does not seem in any way to disapprove of this mode of assessing the damages. The question, however, does not really arise, for in the case of the *Baron Aberdare* I have communicated with the President of the Division, and he states that the case was transferred to, and undertaken

(1) 7 App. Cas. 795, see p. 803.

by, the Admiralty Division on the assumption that the parties had agreed that it should go before the registrar and merchants to be dealt with according to their rule. It seems to me to be obvious that this was so, and that the parties instead of having the damages assessed by an arbitrator, or by an official referee, as would have been the case if they had proceeded in the Queen's Bench Division, took advantage of the special knowledge of the registrar and merchants to get a cheap and satisfactory arbitration. It would therefore be enabling one of the parties to commit a breach of faith if we allow him now to turn round and say that he objects to the mode in which the damages have been assessed.

In the case of the *Gertrude* I have consulted the President, and find that it is an erroneous impression to suppose that cases will not be transferred to the Queen's Bench Division, on the contrary, if objection had been taken, and it had been pointed out to him that the difference between the rules of the two Divisions would lead to the assessment of the damages in a different way, he would have taken the matter into consideration with a view to the transfer of the case. The fact is that the plaintiff brought the action in the Admiralty Division, and the defendant made no objection, because both parties thought that an advantage would be gained by the consideration of the nautical question being undertaken by the judge of the Admiralty Division assisted by assessors, instead of the case coming before a jury, and therefore I take it that both parties consented to have the case tried in the Admiralty Division according to the Admiralty rules, and it is not open to one of the parties now to object to the mode in which the damages have been assessed.

FRY, L.J. These actions would properly have been tried in the Queen's Bench Division, and under s. 24 of the Judicature Act, 1873, if tried in another Division, they should have been determined in that Division in the same manner as the Queen's Bench Division would have determined them, that is, on common law principles. If these two actions had been tried out in the Queen's Bench Division I have great doubts whether these judgments, so far as relates to the interest, could have been given in

1888

THE
GERTRUDE.

THE BARON
ABERDARE.

1888

THE
GERTRUDE.THE BARON
ABERDARE.

that Division, but the parties, in both cases, appear to me to have really proceeded by consent.

LOPES, L.J. I am of opinion that the parties proceeded on the understanding that the Admiralty practice should apply.

Appeals dismissed.

Solicitors for appellants in the *Gertrude*: *Botterell & Roche*.

Solicitors for respondents in the *Gertrude*: *Stokes, Saunders, & Stokes*.

Solicitors for appellants in the *Baron Aberdare*: *Hacon & Turner*.

Solicitors for respondents in the *Baron Aberdare*: *Hollams, Son, & Coward*.

E. S. R.

March 9,
10, 23;
April 11.

THE TASMANIA.

Collision—Maritime Lien—Action in Rem—Liability of Ship—Charterparty—Implied Agreement.

A tug while towing the plaintiff's vessel came into collision with and sank her. The tug was chartered by the defendants, a company, to work with their own tugs, and one of the terms on which the company towed vessels was that they would not be answerable for loss or damage to any vessel in tow of their tugs (which were specified by name) whether occasioned by the negligence of their servants or otherwise. The tug in question was not one of those specified, but the plaintiff was a director of the defendant company, and was aware of the chartering of the tug:—

Held, that the plaintiff must be taken to have impliedly agreed to employ the tug on the same terms as the other tugs of the company, and that his claim was therefore barred by the condition.

By the terms of the above charterparty the defendants were to appoint a captain as pilot, and all damages were to be for charterer's account. The collision was occasioned solely by the negligence of the defendants' captain:—

Held, that an action in rem would not lie against the tug, for the maritime lien arising from collision is not absolute, and the owners not being personally liable for this collision, and the charterers being exempted by the terms of their contract with the plaintiff, the *primâ facie* liability of the vessel was rebutted.

The Ticonderoga (Swa. 215) explained.

ACTION for damage by collision. The plaintiff Harrison was the owner of the smack *Striver*, and he sued the steam-tug *Tasmania* in rem for the loss of the *Striver* through a collision on October 21, 1887, between the *Striver* and the *Tasmania*.

The following are the material facts of the case as stated by the President in his judgment: The plaintiff was the owner of several fishing smacks, which from time to time engaged the services of various tugs, among them the tugs of the Great Yarmouth Steam-tug Company, Limited. The plaintiff was a director of this company, and gave his smack masters general directions to employ the tugs of the company when available in preference to others. The course of business for several years between the tug company and Harrison had been for the tug company to send a quarterly account on which was printed the following notice:—"The Great Yarmouth Steam-tug Company, Limited, owners of the steam-tugs, *Victoria*, *United Service*, *Express*, *Meteor*, *Sailor*, *Star*, *Pilot*, and *Yare*, respectfully give notice that they will tow vessels, boats, or other craft by the above named steam-tugs on the following conditions only: that they are not to be answerable or accountable for any loss or damage whatever which may happen to or be occasioned by any vessel, boat, or craft, or any of the cargoes on board the same, while such vessel, boat, or craft is in tow of either of the steam-tugs, in the river or at sea, and whether arising from or occasioned by any supposed negligence or default of them or their servants, or defects or imperfections in the said steam-tugs, or either of them, or the machinery or any other part of the same, or any delay, stoppage, or slackness of the speed of the same, however occasioned or for what purpose soever taking place, and that the owner or persons interested in the vessels, boats, or craft, or of the cargoes on board the same so towed, undertake, bear, satisfy or indemnify the said tug owners against the same." In October, 1887, the directors of the tug company determined to engage on hire an additional tug for the purpose of rendering on their behalf similar services to those in which their own tugs were employed. On October 18, they entered into the following agreement with the owner of the tug *Tasmania*:—" *Tasmania* hire at 30*l.* per week, payable weekly in advance. Owner finding a crew of five and stores; charterers finding a captain as pilot, coals and port expenses, all damages to be for charterer's account. Salvages and derelicts to be mutually shared. Vessel to be employed towing boats in and out of Great Yarmouth Harbour. Hire to commence and end in

1888

 THE
TASMANIA.

1888

THE
TASMANIA.

London. Charterers to have option of purchasing the vessel at any time during the continuance of this charter at 2850*l*. W. Watkins, G. W. Owens."

On October 21 the *Tasmania* arrived at Great Yarmouth, and in pursuance of the terms of the agreement that the charterers should find a captain as pilot, the tug company appointed in that capacity, George Offord, a servant of theirs, who on their behalf had charge of the *Tasmania* at the time of the casualty which occasioned the litigation. The plaintiff Harrison, as director of the tug company, was present at the meetings of the tug company at which resolutions for the hire of the *Tasmania* were passed, and was a party to the making of the agreement of October 18, and to the appointment of Offord to the control and management of the *Tasmania*, and to her employment to render towage services on the same terms as the tugs of the company had rendered them. The company made the same charges for the services of the *Tasmania* as for those of its own tugs, the charge for towing a fishing-smack into Yarmouth Harbour being 7*s*. 6*d*.

On October 25 the *Striver* arrived off Yarmouth, and the master seeing the *Tasmania* headed the *Striver* towards her for the purpose of being towed in. This manœuvre was sufficient to indicate his wishes, and without a word passing on either side, a line was thrown from the *Tasmania*, the *Striver's* hawser was hauled on board the tug, and she at once proceeded to tow the smack into Yarmouth. In the course of this towage, Offord was at the wheel of the *Tasmania* and ordered her movements, and a collision occurred between the *Tasmania* and the *Striver* in which the *Striver* received such injuries that she foundered shortly afterwards.

March 9, 10. The action was heard.

The learned President gave judgment on the facts, finding that the collision was caused solely by the negligence of Offord, and that there was no contributory negligence on the part of the owner's servants.

March 23. The questions of law were argued.

Cohen, Q.C., *Witt*, and *Aspinall*, for the defendants. The plaintiff could not under the circumstances of this case maintain an

action for breach of contract against the tug company: *The United Service* (1); nor could he maintain an action in personam against the owner of the tug. The master of the tug was not acting as the servant of the owner, and the owner was therefore not liable: *Quarman v. Burnett*. (2) But if no action in personam is maintainable against either the owner of the tug or the tug company, no action in rem will lie: *The Halley* (3); *The Parlement Belge*. (4) The defendants are therefore entitled to the judgment of the Court.

Sir W. Phillimore, Baden-Powell, and Macleod, for the plaintiff. The plaintiff is entitled to recover. Assuming the condition to apply to this case, the *Tasmania* not being one of the specified tugs is not exempted from liability. The plaintiff did not contract on the terms stated in the billhead, in which the company's tugs are specified, therefore the decision in *The United Service* (1) does not apply. Secondly, the defendants cannot set up the condition, for they are not the owners of the tug, and this is an action in rem and not one in personam against them. The plaintiff can recover against the tug: *Fletcher v. Braddick* (5); *The Ticonderoga* (6); *The Ruby Queen*. (7) A maritime lien for the damage done attaches from the time of the collision, and it can be followed out by an action in rem irrespective of any question of contract: *The Julia* (8); *The Thetis* (9); *The Night-watch*. (10)

Cohen, Q.C., in reply, referred to *Hodgkinson v. Fernie* (11); *Jones v. Corporation of Liverpool*. (12)

Cur. adv. vult.

April 11. THE PRESIDENT (after stating the facts). The question is whether the plaintiff Harrison is entitled to recover in respect of the loss of his smack the *Striver*. It is contended for him that the clause exempting the tug company from liability does not apply to negligence of the company's servants

- (1) 9 P. D. 3.
- (2) 6 M. & W. 499.
- (3) Law Rep. 2 P. C. 193.
- (4) 5 P. D. 197.
- (5) 2 Bos. & Pull. (N.S.) 182.
- (6) Swa. 215.

- (7) Lush. 266.
- (8) Lush. 224.
- (9) 3 Mar. L. C. (O.S.) 357.
- (10) Lush. 542.
- (11) 2 C. B. (N.S.) 415.
- (12) 14 Q. B. D. 890.

1888

THE
TASMANIA.

Sir J. Hannen.

in the navigation of the *Tasmania* as distinguished from the tugs belonging to the company. Secondly, that this being an action in rem, the plaintiff is entitled to recover against the ship, and through the ship against Watkins, the owner of the tug, notwithstanding the chartering of the tug to the tug company, and the plaintiff's dealings with that company. Thirdly, that there was contributory negligence on the part of Watkins' servants. This last is a question of fact which I found against the plaintiff, as I consider Offord solely to blame for the collision. With regard to the first point, that the clause exempting the tug company does not apply to the *Tasmania*: if the plaintiff had not been a director of the tug company, and had not had previous dealings with it, it would have been necessary for the tug company in order to free itself from liability for the negligence of its servants in the execution of a contract of towage to shew that the plaintiff had notice of special terms on which the company did its business. But the plaintiff, both as director and a customer of the company, knew those terms. Suppose that instead of the *Tasmania*, one of the tugs named in the printed notice had rendered her services, and the plaintiff, being on board his smack, had thrown the rope to the tug, which from darkness or other cause he did not recognise as one of the company's fleet, he could not in that case have been heard to say, on discovering that the tug he had employed belonged to the company, that he was not bound by the exemption clause because he did not know at the time that it was one of the company's tugs. This course of dealing created an agreement with the company that the company should not be liable for damage to his vessels while in tow of the company's tugs, and this would be incorporated into any contract of towage not specially excluding it, which the plaintiff, or his servants, might enter into with the company. As to the *Tasmania*, the plaintiff knew of and sanctioned her employment by the tug company to render services to any vessel needing them on the same terms as its own tugs were authorized to render them. The plaintiff did not say when he joined with his co-directors in sending out the *Tasmania* to render her services generally on these terms, that he would not be bound by them. Nor, if that had been of any

avail, could he have had any mental reservation to that effect, for it was as much to his interest to employ the *Tasmania* as the company's own tugs, and he stated, I do not doubt truthfully, that he intended his smack masters to give the same preference to the *Tasmania* which he had directed them to give to the company's own tugs over other people's. I come to the conclusion that the plaintiff impliedly agreed with the tug company that in the event of his employing the *Tasmania* it was to be on the same terms as those on which he had previously employed the company's tugs, and, therefore, that the clause exempting the company from liability was in the circumstances of the case binding on the plaintiff with reference to the *Tasmania* as well as to the tugs specifically named in the printed notice.

The second question is, whether the plaintiff is entitled to recover against the tug, notwithstanding the chartering of it to the tug company, and the plaintiff's dealings with that company. It was held in *The Bold Buccleugh* (1) that, where a maritime lien attaches to a ship by reason of collision with another, that lien continues valid against the ship, though she may afterwards pass into the possession of a bonâ fide purchaser. But that decision does not define the cases in which the maritime lien arises. It is not an absolute lien on the ship which has caused the damage, irrespective of all other considerations. For instance, if a wrongdoer takes possession of a vessel, and negligently or wilfully brings her into collision with another, the owner is neither personally liable, nor liable through his ship. In *The Druid* (2) the master of a tug, in order to extract payment of a sum of money he demanded, recklessly towed a vessel into collision and damaged her, and it was held that the tug could not be made responsible for the damage. Dr. Lushington, in an elaborate and learned judgment, stated his view of the law very emphatically: "In all causes of action which may arise from circumstances occurring during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship where the owners were not themselves personally liable, or where their personal liability had not been given up, as in bottomry bonds, by taking a lien on the vessel. The liability

1888

THE
TASMANIA.

Sir J. Hannen.

(1) 7 Moo. P. C. 267.

(2) 1 W. Rob. 391.

1888

THE
TASMANIA.

Sir J. Hannen.

of the ship, and the responsibility of the owners in such cases are convertible terms; the ship is not liable if the owners are not responsible, and vice versâ, no responsibility can attach upon the owners if the ship is exempt and not liable to be proceeded against." With the addition of a definition (supplied by subsequent cases) of the persons who are to be regarded as the owners, I think that this passage from Dr. Lushington's judgment contains a correct statement of the law at this time. In *The Orient* (1) a similar conclusion was arrived at under somewhat different circumstances. The result of these decisions is that, though a ship is commonly spoken of metaphorically as if it were itself capable of doing a wrong, it is an instrument in the hands of its navigators, and its liability will depend on whether those navigators can be identified with the owners or their agents. This was very clearly laid down in the judgment of the Privy Council in the case of *The Halley* (2), where Selwyn, L.J., says: "In cases like the present, where damages are claimed for tortious collisions, a chattel, such as a ship or carriage, may be and frequently is figuratively spoken of as the wrongdoer." In *The Ticonderoga* (3) Dr. Lushington had to deal with the case of a vessel under charterparty by which the charterers had the exclusive control of the vessel, and he held that the vessel might be proceeded against in rem, for damage done by the charterers' servants. He says: "Supposing a vessel is chartered so that the owners have divested themselves for a pecuniary consideration of all power, right, and authority over the vessel for a given time, and have left to the charterers the appointment of the master and crew, and suppose in that case the vessel had done damage, and was proceeded against in this Court. I will admit, for the purpose of argument, that the charterers and not the owners would be responsible elsewhere, although I give no opinion upon that point; but still I should here say to the parties who had received the damage that they had, by the maritime law of nations, a remedy against the ship itself." And, he adds, that compulsory pilotage is the only exception that he is aware of. There is nothing in this judgment which

(1) 3 Mar. L. C. (O.S.) 321.

(2) Law Rep. 2 P. C. 193.

(3) Swa. 215.

leads to the conclusion that Dr. Lushington intended to retract what he had said in *The Druid* (1). It amounts only to this, that he thought that whatever might be the case at common law, by the maritime law of nations, charterers to whom the government of the ship is voluntarily handed over represent the owners so as to bind the ship in cases of collision, and the generality of his remarks must be controlled by the particular circumstances of the case before him. *The Ticonderoga* (2) was followed by Sir R. J. Phillimore in *The Lemington* (3), who rests his decision on the ground that a vessel placed by its owners wholly in the hands of charterers as hirers, and employed by the latter for the lawful purposes of the hiring, is held by the charterers as pro hac vice owners. "Damage wrongfully done by the res which is in the possession of the charterers is, therefore, damage done by the owners or their servants, although those owners may be only temporary. Vessels suffering damage from a chartered ship are entitled primâ facie to a maritime lien upon that ship, and to look to the res as security for restitution." This, so far from supporting the theory that the liability of the chartered ship is absolute, without reference to any limitation of the rights of the owners of the injured ship resulting from a collision between them and the charterers, tends absolutely in the opposite direction, for if they are to be regarded as the "owners pro hac vice," they may, by contract, limit their liability and that of the ship. The question of common law, on which Dr. Lushington abstained from expressing an opinion, had, in fact, been determined in the same way that he decided it by the maritime law. In *Fletcher v. Braddick* (4), Sir James Mansfield held that the owners of a ship chartered to the government were liable for injury done by the misconduct of those on board, though done by order of a government officer in command. Sir James Mansfield dwells much on the difficulty of the injured person knowing in whose charge the ship is. "No person," he says, "can be supposed to know of any previous arrangement between the owners and the commissioners." If anything, indeed, turns on the knowledge of the parties, the present case differs from *Fletcher v. Brad-*

1888

THE
TASMANIA.

Sir J. Hannen.

(1) 1 W. Rob. 391.

(2) Swa. 215.

VOL. XIII.

(3) 2 Aspinall's Maritime Cases (N.S.) 475.

(4) 2 Bos. & P. (N.S.) 182.

N

1888

THE
TASMANIA.

Sir J. HANNEN.

dick (1) in this, that the plaintiff here was fully aware of the terms of the charter to the tug company. It is unnecessary for me to express an opinion whether the law as laid down in *Fletcher v. Braddick* (1) is modified by *Quarman v. Burnett* (2) and the cases which have followed that decision. The case of *Hodgkinson v. Fernie* (3), cited in argument, seems rather to turn on the duty of those under charter to the government in a common warlike undertaking to obey the orders of the government officer. The result of the authorities cited appears to me to be this, that the maritime lien resulting from collision is not absolute. It is a *primâ facie* liability of the ship, which may be rebutted by shewing that the injury was done by the act of some one navigating the ship not deriving his authority from the owners; and that, by the maritime law, charterers, in whom the control of the ship has been vested by the owners, are deemed to have derived their authority from the owners, so as to make the ship liable for the negligence of the charterers, who are, *pro hac vice*, owners. These propositions do not lead to the conclusion that where, as between the charterers and the person injured, the charterers are not liable, the ship remains liable nevertheless. On the contrary, I draw from these premises the conclusion that whatever is a good defence of the charterers against the claim of the injured person is a good defence for the ship, as it would have been if the same defence had arisen between the owners and the injured person. Let me now shortly recall the facts of this case. The plaintiff agreed that the tug company should not be answerable for damage happening to his smack when being towed by any of the company's tugs. It is of course not suggested that he would, notwithstanding this agreement, be entitled to proceed against one of the company's tugs employed by him for damages done by the tug. For the reasons I have stated I hold that the plaintiff, in effect, agreed that if he employed the *Tasmania* it should be on the same terms as applied to the company's tugs. One of the implied terms is that the tugs themselves shall not be liable any more than the company, and this will also apply to the *Tasmania*. If not, this result will follow,

(1) 2 Bos. & P. (N.S.) 182.

(2) 6 M. & W. 499.

(3) 2 C. B. (N.S.) 415.

that the plaintiff will recover against the *Tasmania*, and through it against Watkins, the owner, but Watkins under his agreement with the tug company will be entitled to be indemnified by the tug company, and so the loss will fall on the tug company. Thus the very object of the printed notice given by the company and accepted by the plaintiff as the basis of his contract with them would be defeated. The result will be but little more absurd if, as I understand the concluding words of the printed notice, the plaintiff would in his turn be bound to indemnify the tug company against the claim of Watkins. The plaintiff's action therefore fails, but he will be entitled to the cost of the issues of facts upon which he succeeded.

1888

THE
TASMANIA.

Sir J. Hannen.

Solicitors for plaintiff: *Ingledeu, Ince, & Colt, for Chamberlain & Leech, Great Yarmouth.*

Solicitors for defendants: *Pritchard & Sons, for Wiltshire & Son, Great Yarmouth.*

E. S. R.

THE ROTHBURY.

Jan. 21, 26;
May 10;
June 19.

Shipping Casualty—Rehearing—Merchant Shipping (Carriage of Grain) Act 1880 (43 & 44 Vict. c. 43), s. 4, sub-s. (c)—Board of Trade Regulations, August, 1881—Cargoes—Two-deck Ship—Shifting-boards in lower Hold—Feeders.

A ship having two decks and loaded with a cargo of barley in bulk at a port in the Mediterranean must, upon the proper construction of s. 4, sub-s. (c), of the Merchant Shipping (Carriage of Grain) Act, 1880, and the Board of Trade Regulations of August, 1881, be provided with shifting-boards in the lower hold.

By paragraph 4 (b) of these regulations—which directs that feeders shall be fitted to feed the grain carried in the between decks, such feeders to contain not less than 2 per cent. of the compartments they feed—it is intended that the feeders feeding the grain carried in the between decks, shall contain not less than 2 per cent. of the grain in the compartments in the between decks which they feed, and of the grain in the hold below which is fed by such compartments.

REHEARING by Butt, J., assisted by Trinity Brethren, of an investigation held at Middlesborough by the stipendiary magistrate, sitting with assessors, into the circumstances attending the abandonment of the British steamship *Rothbury*.

1888

THE
ROTHBURY.

The report of the magistrate to the Board of Trade, with the annex thereto, was appended to a statement agreed upon by the solicitor to the Board of Trade and the solicitor for the shipowner. This statement purported to contain the substance of the evidence taken before the Court below, and was drawn up with a view to raise the question which it was proposed to submit to the Court at the rehearing. This question was contained in the order of the Board of Trade, made under the Shipping Casualties Investigation Act, 1879, s. 2 (1), by which the investigation was only to "be reheard as to a certain part thereof, that is to say, whether the said vessel was loaded in accordance with the provisions of the Merchant Shipping (Carriage of Grain) Act, 1880, as modified by the Regulations made by the Board of Trade thereunder."

1888. Jan. 21. *Danckwerts*, for the Board of Trade.

J. Gorell Barnes, for the shipowner.

After argument Butt, J., took time to consider his judgment.

Jan. 26. BUTT, J., intimated that he could not deliver judgment on the evidence before him, and that notes of the proceedings below must be produced.

May 10. *Danckwerts*, for the Board of Trade.

The shipowner was not represented.

Counsel for the Board of Trade read a transcript of the shorthand notes of the evidence taken in the court below, and also examined a surveyor of the Board of Trade.

The facts, so far as material, and the arguments are stated in the judgment. The section of the Act (43 & 44 Vict. c. 43, s. 4,

(1) Shipping Casualties Investigations Act, 1879 (42 & 43 Vict. c. 72), s. 2, sub-s. (1): "Where an investigation into . . . a shipping casualty has been held under the Merchant Shipping Act, 1854, or any Act amending the same . . . the Board of Trade may, in any case, and shall, if new and important evidence which could not be produced at the investigation has been discovered, or if for

any other reason there has in their opinion been ground for suspecting a miscarriage of justice, order that the case be reheard, either generally or as to any part thereof, and either by the Court or authority by whom it was heard in the first instance, or . . . by a judge of Her Majesty's High Court of Justice exercising jurisdiction in Admiralty cases. . . .

sub-s. (c)), and the regulations of the Board of Trade of August, 1881, relating to barley shipped at ports in the Mediterranean (paragraphs 2, 3, and 4), on which the decision turned, are also there set out.

1888

THE
ROTHBURY.

Cur. adv. vult.

June 19. BUTT, J. This is the re-hearing of an investigation into the circumstances attending the abandonment of the steamship *Rothbury* held at Middlesborough by the stipendiary magistrate assisted by two nautical assessors: the question for my determination being whether the vessel was loaded in accordance with the provisions of the Merchant Shipping (Carriage of Grain) Act, 1880, and the Regulations made by the Board of Trade thereunder.

The *Rothbury*, a screw steamship of 604 tons nett and 950 tons gross register, left the port of Oran for Dunkirk on August 23, 1887, with a cargo of 1080 tons of barley. In the course of her voyage the ship met with bad weather, the cargo shifted, and she was abandoned by her crew in the Bay of Biscay on September 4.

The grain was stowed in bulk in the 'tween decks and the lower holds. The space in the 'tween decks was divided by longitudinal shifting-boards extending from deck to deck, but there were no shifting-boards in the hatches, the top of the shifting-boards ceasing on a level with the deck. There were no shifting-boards at all below the 'tween decks. The lower deck hatches were not put on, and there were some openings made through the deck in the wings for the purpose of feeding the cargo in the lower hold: but the evidence goes to shew that these openings were deficient in number and in size.

The carriage of grain in bulk between the decks, except such grain as may be necessary for feeding the cargo in the hold, and which is carried in properly constructed feeders, is prohibited by s. 4, sub-s. (a), of the Act of 1880, unless it is loaded in accordance with the regulations for the time being approved by the Board of Trade as provided by s. 5.

The question then arises was this ship loaded in accordance with the Board of Trade Regulations?

1888

THE
ROTHBURY.

Butt, J.

In August, 1881, the Board of Trade issued certain Regulations still in force, amongst which the following apply to this case:—

“Ships having two decks.”

“2. In the case of ships having two decks, and loading a grain cargo at a port in the Mediterranean or Black Sea, barley may be carried in bulk in the ’tween decks, provided—

“3.

“(a) That the ’tween deck hatches shall not at any time be put on; and

“(b) That strakes of the deck be lifted, or if the deck is an iron deck, sufficient openings be made through the deck in the wings, which with the open hatches shall admit of the cargo in the between decks feeding the lower hold.

“4.

“(a) There shall be longitudinal grain-tight shifting-boards in accordance with sub-s. (c) of s. 4 of the said Act, and the grain shall be properly stowed, trimmed, and secured, as required by sub-s. (d) of the said section 4.

“(b) Feeders shall be fitted to feed the grain carried in the between decks, such feeders to contain not less than 2 per cent. of the compartments they feed.”

It is therefore clear that the above regulations are not complied with unless the shifting-boards prescribed by s. 4, sub-s. (c), of the Act of 1880 are provided.

Sub-s. (c) is as follows:—

“Where grain is carried in the hold or between the decks, whether in bags or bulk, the hold or the space between the decks shall be divided by a longitudinal bulkhead, or by sufficient shifting-boards which extend from deck to deck, or from the deck to the keelson, and are properly secured, and, if the grain is in bulk, are fitted grain tight with proper fillings between the beams.”

It is contended by the Board of Trade that this cargo was improperly stowed, because, although there were shifting-boards in the ’tween decks, there were none in the holds below.

On the other hand the shipowner says sub-s. (c) does not require shifting-boards in the holds where grain is carried in bulk in the ’tween decks, and provision is made for feeding the cargoes in

the holds in the manner prescribed by the regulation above set forth: that such provision for feeding the lower holds renders shifting boards in those holds unnecessary, and that all that the statute requires is the use of shifting-boards from deck to deck in the case of a vessel having two decks, or from deck to keelson in vessels that have only one deck.

I do not agree with this latter view of sub-s. (c). I think the true interpretation of it is this. It is an enactment dealing separately with the spaces in a ship, whether 'tween decks or holds, in which grain is carried, and its meaning is that in each of the spaces in which grain is carried there shall be shifting-boards as provided. That appears to me to be the natural meaning of the words, and unless there are some considerations pointing to a different construction, I must give them that effect.

But it is said such considerations do exist: that if proper provision be made for keeping the lower holds full by feeding them from above, the grain in those holds cannot shift.

No doubt if, by such means, the lower holds could be kept absolutely full, little or no shifting of the cargo could take place, but I very much doubt whether anything of the sort can be done. Having the advantage of the Elder Brethren to assist me here, I have asked them this question: Are shifting-boards in the hold of any use in a two-decked ship carrying barley in bulk in the 'tween decks and the holds when sub-ss. (a) and (b) of art. 3 of the Board of Trade Regulations are complied with? Their answer is, we consider that they still continue to be desirable.

The facts of the present case seem to bear out this view, for the holds were not kept full, and the cargo did shift.

I hold, therefore, that this vessel was improperly loaded, inasmuch as she had no shifting-boards in her lower holds.

There is another respect in which I find that the statutory requirements had not been complied with.

One of the regulations set out above prescribes that the feeders used for feeding the grain in the 'tween decks shall contain not less than 2 per cent. of the compartments they feed.

It appears by the evidence that two of the hatches of the upper deck used as feeders were not capable of containing 2 per cent. of the grain in the compartments of the 'tween decks which

1888

THE
ROTHBURY.
Butt, J.

1888

THE
ROTHBURY.

Butt, J.

they were respectively meant to feed; and that the two other hatches were not capable of containing 2 per cent. of the grain in the compartments in the 'tween decks they were designed to feed, and of the grain in the holds below such compartments respectively.

It was contended by the shipowner that the true construction of the regulation in question is that the feeder need only contain 2 per cent. of the grain in the compartment of the 'tween decks into which it leads, and not 2 per cent. of the grain in such compartment and of the grain in the hold below, which is fed by such compartment. I think that this is a construction opposed to what those who framed the regulation must have intended to express, but I cannot say that I think it contrary to the meaning of the words they have used.

Again, the evidence before the stipendiary magistrate shewed that the fore hold was not full, the grain being trimmed on a slant up to the bulkhead, and spare gear placed on the top of the cargo. This was obviously improper stowage.

For the above reasons I decide that the *Rothbury* was improperly loaded.

Solicitor for the Board of Trade: *W. Murton.*

Solicitors for the owners of the *Rothbury*: *W. A. Crump & Son.*

E. S. R.

THE VICTORIA.

1888

July 3.

Ship—Limitation of Liability—Priorities of Claimants—Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), s. 54.

The plaintiffs in an action to limit their liability paid into court the sum of 7862*l.* 0*s.* 10*d.*, being the amount of their statutory liability at the rate of 15*l.* per ton. The amount so paid into court being insufficient to satisfy in full claims against the plaintiffs in respect of loss of life and loss of goods, the registrar, by his report, found that the claimants in respect of loss of life were entitled to be paid out of the sum in court an amount equal to 7*l.* per ton, and that they and the claimants in respect of loss of goods should rank *pari passu* against the balance representing 8*l.* per ton. On objection to the report:—

Held, that the report was right, as the Court had power to marshal the assets, and that the claimants in respect of loss of goods had no right in priority to the claimants in respect of loss of life against the sum representing 8*l.* per ton.

SUMMONS to confirm the report of the registrar, adjourned into court.

The owners of the *Victoria*, which had been lost by stranding, had in the usual limitation action paid into court the sum of 7862*l.* 0*s.* 10*d.*, being the amount of their statutory liability, against claims for loss of goods and life at the rate of 15*l.* per ton, 8*l.* per ton of such 15*l.* being the limit in respect of loss of goods. (1)

The registrar found by his report that there was due to the claimants in respect of loss of life and personal injury 8975*l.*, and

(1) 25 & 26 Vict. c. 63, s. 54: "The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say, (1) Where any loss of life or personal injury is caused to any person being carried in such ship; (2) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board on any such ship; (3) Where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any such ship or boat; (4) Where any loss or damage is by reason of the improper naviga-

tion of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat; be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage."

1888

THE
VICTORIA.

to the claimants in respect of loss of goods and merchandise
767*l.* 1*s.* 4*d.*

The sums allowed for claims in respect of loss of goods thus exceeded the sum of 8*l.* per ton as paid into court, and the claims in respect of loss of life the sum of 7*l.* per ton, the amount per ton over and above the sum of 8*l.* per ton, and which was applicable solely to the life claims. The registrar stated in his report that he was of opinion "that the balance of the claims for loss of life and for personal injury which the amount equal to 7*l.* per ton is insufficient to cover must be entitled to rank *pari passu* with the claims for loss of goods against the further amount equal to 8*l.* per ton."

On the usual summons to confirm the report, the goods claimants objected to the report, on the ground that they were entitled to the whole of the 8*l.* per ton for division among themselves. The summons was thereupon adjourned into court.

Aspinall, for the claimants, in respect of loss of goods. The claimants in respect of loss of goods have the first charge on the 8*l.* per ton, and the claimants in respect of loss of life are not entitled to any part of such sum until such first charge has been satisfied. The Act appropriates a specific sum to claimants in respect of loss of goods: 25 & 26 Vict. c. 63, s. 54.

[He referred to *Nixon v. Roberts* (1) and *Leycester v. Logan* (2), decided on the repealed s. 504 and upon s. 514 of the Merchant Shipping Act, 1854.]

Pyke, for the claimants in respect of loss of life. The claimants in respect of loss of goods are not entitled to priority as regards the 8*l.* per ton. 7*l.* is absolutely set apart for the claimants in respect of loss of life, and the balance of 8*l.* is to be applied according to the rights and priorities of the several claimants. By s. 114 of the Merchant Shipping Act, 1854, the sum paid into court is to be distributed rateably among the claimants. The Acts, therefore, confer no priority upon any class of claimants, but merely place a limit to the shipowner's liability.

[He referred to *Burrell v. Simpson*. (3)]

(1) 1 J. & H. 739.

(2) 26 L. J. (Ch.) 306.

(3) 4 Ct. Sess. Cas. 4th Series, 177.

Aspinall, in reply.

1888

THE
VICTORIA.

BUTT, J. A question of some nicety as to the effect of the clauses of the Merchant Shipping Acts, 1854 and 1862, in regard to the limitation of the shipowner's liability, has been raised in this case. *Primâ facie*, the report of the registrar seems just and equitable. But it is contended that the registrar has no right to apply any part of the 8*l.* per ton out of the 15*l.* per ton paid into court to the life claims until the claims of the owners of cargo on this amount have been satisfied. They claim in fact in priority to the life claimants upon this amount. But does the Act give them any such right? In my opinion this contention does violence to the Act itself, which confers no right on those who are suing either in respect of loss of goods or of life. The Act interferes with the claimants' right only by putting a limitation on the amount which they can recover from the shipowner, and there is nothing in the Act to shew that persons who have suffered loss have their rights otherwise altered. The statute does not say that goods owners are to recover up to the amount of 8*l.* per ton, but only that the amount of their claim to be allowed shall not exceed that sum. I am unable to accede to the argument that the goods owners are entitled to exhaust 8*l.* per ton of the 15*l.* per ton paid into court in priority to the life claimants. I therefore confirm the registrar's report. Costs of this summons must be costs in the cause, as the application to the Court was, under the circumstances, reasonable.

Solicitors for plaintiffs: *Norton, Rose, & Co.*

Solicitors for life claimants: *Ingledew, Ince, & Colt.*

Solicitors for goods claimants: *Rollit & Sons.*

E. S. R.

1888

March 9, 16.

[IN THE CONSISTORY COURT OF LONDON.] (1)

TANNER (CLERK) *v.* SCRIVENER (CLERK).*Curate—Notice to quit Cure—1 & 2 Vict. c. 106, ss. 95, 112.*

A notice by an incumbent to a curate to quit his curacy, given under 1 & 2 Vict. c. 106, s. 95, is not a notice within or subject to the regulations prescribed by s. 112 of the same statute.

HEARING by the Lord Bishop of London, assisted by the Chancellor of the diocese, under 1 & 2 Vict. c. 106, s. 83, of a complaint by a curate, viz., that he had not been paid a quarter's salary to which he was legally entitled.

H. C. Richards, for the curate, Mr. Tanner.

Dennis, for the incumbent, Dr. Scrivener.

The question of law raised in the case was whether a legal notice to quit had been given by the incumbent to the curate.

The facts sufficiently appear from the Chancellor's judgment.

Cur. adv. vult.

1888. March 16. THE CHANCELLOR (DR. TRISTRAM, Q.C.). The question in this case is whether a notice given by Dr. Scrivener, the vicar of Hendon, to Mr. Tanner, to quit the curacy of Hendon, and personally served on him on May 24 last, is a good notice under the 95th section of 1 & 2 Vict. c. 106.

The notice was as follows:—

“Hendon Vicarage, May 21st, 1887.”

“Dear Sir,—It is my painful duty to give you the *present* notice, for which I hold the written permission of the Bishop of London, that your engagement as licensed curate of the parish of Hendon will terminate at the expiration of six months from the present date.

“I am, dear Sir,

“Yours faithfully,

“Rev. W. Tanner.”

“F. H. A. Scrivener.

(1) Before the Lord Bishop of London sitting with Dr. Tristram, Q.C.,
Chancellor.

Two objections were taken by Mr. Tanner's counsel to the validity of the notice.

1st. That the formalities regarding notices prescribed by 1 & 2 Vict. c. 106, s. 112 had not been complied with, and that compliance with them was essential to its validity.

2nd. That the notice as served did not in form constitute the six months' notice required by the 95th section of the statute.

As to the first objection, s. 112 enacts "that in all cases in which proceedings under this Act are directed to be by monition and sequestration, such monition shall issue under the hand and seal of the bishop, and such monition and any other instrument or notice issued in pursuance of the provisions of this Act, and not otherwise specially provided for, shall be served" by shewing the original notice to the party served, and leaving with him a copy, and if he cannot be found by leaving a copy at his last residence, and affixing another copy to the door of his parish church, and the original notice with an affidavit of service is then directed to be filed in the Consistorial Registry of the Diocese.

Sect. 95 enacts that an incumbent having first obtained the permission of the bishop, to be signified by writing under his hand, may require a licensed curate to quit his curacy upon six months' notice thereof given to the curate.

The contention on behalf of Mr. Tanner is that these two sections must be read together, and that in the service of notices given under s. 95 the formalities prescribed by s. 112 must be adhered to.

The words in s. 112 relating to notices are no doubt wanting in precision and perspicuity, and standing alone might be open to the construction contended for by Mr. Tanner's counsel. But the question upon which it is my duty to advise his Lordship is, whether this is to be taken in law as their true construction.

If this section is applicable to curates' notices, it is obvious they must be in writing, as otherwise they could not be served in the manner directed by it, namely, by shewing the original notice to the party served and leaving with him a copy, and so forth.

But on referring to the 95th and two following sections, it will be found that there are five different notices in relation to curates provided for in these sections—two in s. 95, two in s. 96, and one

1888

TANNER
v.
SCRIVENER.

1888

TANNER
v.
SCRIVENER.

in s. 97—and that only one of these notices, the second one in s. 96, is directed to be “in writing,” and that in the other four cases, including the one now under consideration, the notices are directed to be given simply, the words “in writing” being omitted.

Taking these sections alone the irresistible conclusion would be, that when the legislature intended that the notice should be in writing, it is so expressed in the Act, and that where it intended to leave it optional to give a written or verbal notice the words “in writing” are purposely omitted.

It is contended, however, that this omission is to be supplied by implication from the general expressions regarding “notices” used in the first part of the subsequent s. 112. But after a careful consideration of the sections I have referred to and other sections of the Act, I have come to the conclusion that s. 112 does not apply to notices to leave curacies, whether given by incumbents to curates, or by curates to incumbents, and that its application is limited to cases where the proceedings are by monition and sequestration, and for the following further reasons.

The special object of this section is to prescribe the formalities to be observed in proceedings by monition and sequestration, and the words “any other instrument or notice issued in pursuance of the provisions of this Act” relied upon as referring to notices given under s. 95 are general words following the specific word “monition,” and come, I think, within the rule referred to in argument, “that general words following in a statute specific words of the same nature are to be read as referring only to the specific words unless there be something in the Act to shew that a wider sense was intended to be given to them”: Maxwell on Statutes (2nd ed.) p. 405.

No reference is made in s. 95 or in the two subsequent sections to s. 112 as is done in the 54th section, where an order to enforce the residence of incumbents by monition and sequestration is expressly required to be served in like manner as is therein after declared with respect to the service of monitions. The formalities of service and the subsequent filing in the diocesan registry of the original notice and of an affidavit of its service required by s. 112 are appropriate and usual formalities observed in analogous

proceedings in the Ecclesiastical Courts, but are neither usual nor appropriate in the case of an ordinary notice to quit a residence or service.

The inconvenience of requiring the observance of such formalities in the case of notices to quit between incumbents and their curates when the party to be served is away from home, more especially if he is on the continent, and the legal expenses consequent on such requirements, as in every case it would practically involve the employment of a solicitor, make it extremely improbable that the legislature would have gone out of its way to impose them by this Act, for the first time, upon the clergy, and the rule laid down by Lord Coke, "that in determining the construction of statutes, an argument drawn from inconvenience is forcible in law," 1 Co. Litt. 97, may well be held to apply to the present case.

For the above reasons I have come to the conclusion that the first objection cannot be sustained.

[The learned Chancellor then discussed the second point, and advised that Mr. Tanner's claim should be dismissed.]

Solicitors for Mr. Tanner: *Brooks, Jenkins, & Co.*

Solicitors for Dr. Scrivener: *Waller & Sons.*

E. S. R.

1888

TANNER

v.

SCRIVENER.

1888

May 8.

D'ETCHEGOYEN v. D'ETCHEGOYEN.

Divorce—Act on Petition—Domicil—Jurisdiction.

In proceedings for divorce it appeared that the petitioner had been born in France of French parents. When he was ten years old his parents settled in England, and the father subsequently obtained letters of naturalization as a British subject. The petitioner when eighteen years of age went to Canada, where he took up the business of farming, bought a farm, served in the Canadian volunteers, and discharged the duties of a citizen of Canada. In 1878 he married the respondent, who was a Canadian, and in 1883 he brought her with their children to this country, where he resided for some years with his father. He had occasion to return several times to Canada, as he alleged, to look after his farm, and from 1884 was only seven months in this country. The respondent remained in England until the date of the alleged adultery, when she visited France :—

Held, that the petitioner had not lost his English domicil—that the matrimonial home was in England, and that the Court had therefore jurisdiction over the proceedings.

THIS was a petition by the husband for the dissolution of his marriage on the ground of his wife's adultery with the co-respondent. The wife had appeared under protest, and denied the jurisdiction of the Court, alleging that the petitioner's domicil was French or Canadian but not English either at the time of the alleged adultery or of the filing of the petition. The question came before the President in the form of an act on petition.

From the affidavits it appeared that the petitioner, Jean Baptiste D'Etchegoyen, was born in France in 1854 of French parents, and resided in France until 1864. In that year his parents came to this country and took up their permanent residence here, and in 1876 his father became a naturalized British subject. In 1872 the petitioner, being then eighteen years of age, went to Canada, where he became a cattle farmer, and in 1876 purchased a farm and settled on it. While in Canada he discharged all the duties of Canadian citizenship, voted at elections, and served for three years in a regiment of volunteer cavalry. On account of this, in May, 1883, he applied for and received from the French Government "letters of relief"—relieving him from the penalties which a French subject may incur from serving in a foreign military force. In an application made

to the Home Office on his behalf it was stated that he was temporarily resident in Canada but that he meant to return to England.

In 1878 he was married to the respondent in the province of Quebec, and in the marriage settlement, in which he settled his farm on himself, his wife, and the issue of the marriage, he described himself as resident in Canada. He lived with his wife in Canada until October, 1882, when he let his farm and came to England, bringing his wife and children with him, and resided with his father in London until September, 1884. In May, 1885, he went back to Canada and returned in September, but again went back to Canada, as he stated in his affidavit, to look after his farm, and since 1884 it was alleged that he had only been seven months in England.

The petition, which alleged adultery in England, was filed in July, 1887, and since that time the respondent had been resident in France.

B. Deane, for the respondent. Even if the husband does not retain his domicile of origin, the matrimonial home was clearly Canadian, a fact which, according to *Niboyet v. Niboyet* (1), confers jurisdiction for the purposes of divorce. There is no proof that the petitioner has acquired an English domicile. He is not resident here, and according to *Yelverton v. Yelverton* (2) mere visits to this country will not give jurisdiction. By the petitioner's own admission, he has only since 1885 paid visits to this country and has not resided here. All his business was in Canada.

Searle, for the petitioner. The domicile of the petitioner is that of his father. This was an English domicile, and the petitioner has never lost it. After his return from Canada he manifested no intention of returning there, and he had made his matrimonial home in this country.

There was a bonâ fide residence here, which, according to *Brodie v. Brodie* (3), is sufficient to give jurisdiction for matrimonial purposes, and *Wilson v. Wilson* (4) established that an English

1888

D'ETCHE-
GOYEN
v.
D'ETCHE-
GOYEN.

(1) 4 P. D. 1.

(2) 1 Sw. & Tr. 574.

(3) 2 Sw. & Tr. 259.

(4) Law Rep. 2 P. & M. 442.

1888 domicil at the commencement of the suit was sufficient to give
D'ETCHE- jurisdiction.
GOYEN

v.
D'ETCHE-
GOYEN.

THE PRESIDENT. This case resolves itself into the question what was this man's domicil at the time of the institution of the suit. He appears to have been born of French parents, but the father settled in England in 1864, when the petitioner was only ten years old. It is stated, and not denied, that the father then became permanently settled in England, under such circumstances as to lead me to infer that he had acquired an English domicil. That inference is strengthened by the fact that he became a naturalized Englishman in 1876. The fact of the father acquiring an English domicil draws with it the acquisition of an English domicil by the son, and those who assert that he changed it must shew facts leading to that conclusion. It appears that he went to Canada when he was about eighteen or nineteen, and has given us an explanation of his having done so. He says that he had a taste for farming, and went there for the purpose of studying farming in that place. Undoubtedly the fact that he afterwards bought a farm makes strongly for the conclusion that he had the intention of permanently fixing himself there, and if that fact had stood alone Mr. Deane would have made out his case; but I have come to the conclusion, that when all the facts are taken into consideration, the circumstance of his having purchased a farm is out-weighed by other evidence. He says positively that he never had the intention of abandoning his English domicil, or of settling in Canada permanently. Of course a man may acquire a fresh domicil without knowing it, but the evidence must be very clear to establish that. After having been there some time, he became engaged to be married, and he settled that farm upon his wife. That goes far to account for the fact that he purchased it. The fact of a man purchasing land in another country is only one of the circumstances which must be taken into account, but it does not establish the fact that he intended to remain in Canada permanently. A great impression is made upon my mind by the statement put forward with regard to his becoming a naturalized Englishman, when he stated distinctly that he was only tem-

porarily in Canada and intends to return to England. That is a bonâ fide statement, for when it was made there was no question between him and his wife, or any question such as has now arisen. He lives here with his wife and family and remains here two years until the lease of the farm expires, then something has to be done, and he says the reason of his having been so much in Canada at various times was with the object of not leaving his property to shift for itself. The lease having expired he had occasion for some time to look after the farm to prevent it going to rack and ruin. That seems to me to be a reasonable explanation of his visits to Canada. It appears that the lady has not gone to Canada, she remained here from 1882 to this time, and the fact that he left her while he himself went to Canada and returned, is a strong evidence that he had not the intention of permanently settling in Canada. Apart from the events which have since happened I should strongly incline to think that where a man leaves his wife, returning to her from time to time, that is the place of the matrimonial home. The result is, that I think that he has established that his domicile is English, and has never ceased to be English. I therefore overrule the petition, pronounce against it, and order the respondent to answer.

1888

D'ETCHE-
GOYEN
v.
D'ETCHE-
GOYEN.

Solicitors for petitioner: *Simpson, Hammond, & Co.*

Solicitors for respondent: *Calkin, Lewis, & Stokes.*

W. L.

1888

May 1;
June 19.

CORBETT v. CORBETT.

Divorce—Wife's Suit—Permanent Maintenance—Property liable to be charged
—Prohibition against Alienation—Forfeiture—Order—20 & 21 Vict. c. 85,
s. 32—29 & 30 Vict. c. 32, s. 1.

In a petition by a wife for permanent maintenance after the dissolution of her marriage on the ground of adultery and cruelty, it appeared that the husband, in addition to his pay and allowances as a surgeon in her Majesty's navy, amounting to 228*l.* 2*s.* 6*d.*, was also entitled under the will of his father to an income amounting to 109*l.* 4*s.* 6*d.*, arising from houses in the city of Cork and certain shares vested in trustees, being a third share of the father's estate, upon trust "for the sole use and benefit" of the respondent, and "to be assigned, transferred, and handed over to him as soon as conveniently may be" after the decease of the father. The will directed that if any of the three sons of the testator should die unmarried and without issue his share should go to the survivors, and it was further provided that neither of the sons of the testator should have power to mortgage, sell, alien, charge or incumber any part of the property assigned to them, and that in the event of either of them doing so the trustees should stand possessed of his share:—

Held, that the respondent took an estate in fee simple under the will, that the provision for forfeiture in case of alienation was therefore void, and that he must be ordered to secure to his wife an annual sum of 84*l.* for her life.

APPLICATION to confirm the registrar's report on a petition for permanent maintenance presented by a wife who had obtained a decree dissolving the marriage on the ground of her husband's adultery and cruelty. There were no children of the marriage. The registrar reported that the respondent's income amounted to 337*l.* 7*s.*, viz. 228*l.* 2*s.* 6*d.* pay and allowances as surgeon in the navy, and 109*l.* 4*s.* 6*d.* from property in Ireland to which the petitioner was entitled under the will of his father. The registrar recommended that the amount of the yearly income secured to the wife should be 112*l.*, and on the part of the respondent it was objected that his pay and allowances were not permanently fixed at the amount stated, but only during the period of his active service, and that under the terms of his father's will the respondent would forfeit his interest in the property devised to him in the event of his charging or incumbering it in any way. The other facts will be found fully stated in the judgment.

Middleton (*Farwell* with him), for the petitioner.

Bayford, Q.C. (Lindsay, with him), for the respondent.

In the course of the arguments on both sides the following authorities were cited: *Medley v. Medley* (1); *Milne v. Milne & Fowler* (2); *Eaton v. Eaton & Campbell* (3); *Shaw v. Ford* (4); *In re Rosher* (5); *Dugdale v. Dugdale* (6); *Billing v. Welch* (7); Co. Litt. 223 a; Sheppard's Touchstone, vol. i. p. 130.

1888

CORBETT
v.
CORBETT.

Cur. adv. vult.

BUTT, J. This is a suit in which the petitioner sued for and obtained a decree for the dissolution of her marriage on the ground of her husband's adultery and cruelty.

In due course a petition for maintenance was filed by the petitioner, and a report thereon was made by the registrar.

The matter now comes before me on a motion to confirm the registrar's report.

The registrar has found that the husband, who is a surgeon in Her Majesty's fleet, is in receipt of pay and allowances amounting to 228*l.* 2*s.* 6*d.* per annum, and that under the will of his father he is interested in three houses situate in the city of Cork, and sixty-two shares in the Cork, Blackrock and Passage Railway Company, such houses and shares being at present vested in trustees; that the three houses produce a net income of 100*l.*, and the shares 9*l.* 4*s.* 6*d.* annually. The husband's income thus amounts to 337*l.* 7*s.* It is further stated in the report that there is no issue of the marriage, that the wife is without means and is wholly dependent upon her father.

The questions now raised are :

(1.) Whether the respondent shall be ordered to secure a gross sum of money, or an amount to be paid annually by a charge on his property, or whether an order shall be made on him for payment to the wife during their joint lives of monthly or weekly sums for her maintenance and support.

(2.) What the amount to be so secured or paid shall be.

(1.) By the 20 & 21 Vict. c. 85, s. 32, the Court is empowered

(1) 7 P. D. 122.

(2) Law Rep. 2 P. & M. 295.

(3) Law Rep. 2 P. & M. 51.

(4) 7 Ch. D. 669.

(5) 26 Ch. D. 801.

(6) 38 Ch. D. 176.

(7) 6 Irish L. R. (Com. Law) 88.

1888
CORBETT
v.
CORBETT.
Butt, J.

to "order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life as, having regard to her fortune, &c., it shall deem reasonable."

The 29 & 30 Vict. c. 32, authorizes the Court in cases in which the husband "has no property on which such payment of such gross and annual sum can be secured," to make an order on the husband "for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance or support as the Court may think reasonable."

In the case of *Medley v. Medley* (1) the Court of Appeal decided that the order for maintenance must be made under one or the other of these two statutes and cannot be made in the alternative.

It seems clear, moreover, that the Court has no power to make an order under the 29 & 30 Vict. c. 32, except in cases where the husband has no property on which the requisite amount can be secured.

In the present case the petitioner alleges and the respondent denies that the respondent has property on which the amount of the wife's maintenance can be secured.

By a document dated August 7, 1879, in the form of an indenture or deed of settlement, but which was proved as a will, James Corbett, the father of the respondent, gave to trustees certain property for the use and benefit of his three sons respectively. The bequest to the respondent was in the following words: "And as to for and concerning the houses and premises on the South Wall and Princes Street now the property of the said James Corbett with the household furniture plate linen and china in said house in Princes Street aforesaid with all his shares in the Cork Blackrock and Passage Railway Company together with thirty shares in the Munster Bank and one-fourth part or share of the Spanish Bonds upon trust to and for the sole use and benefit of John Nicholas Corbett the second son of the said James Corbett his heirs executors and administrators and to be assigned transferred and handed over to him as soon as conveniently may be after the decease of the said James Corbett but

(1) 7 P. D. 122.

subject to the provision against mortgaging or alienating same as hereinafter contained.”

The following words are also contained in the will:—

“Provided always and it is hereby expressly declared and agreed upon by and between the parties hereto and it is the true intent and meaning hereof that in the event of the death of any or either of the said three sons of the said James Corbett unmarried and without lawful issue that the share or shares of him or them so dying shall go to and be equally divided amongst such of the other children of the said James Corbett as shall be then living save and except such of them as should be then nuns in Holy Orders. And provided further that the freehold and leasehold property hereby conveyed and assigned for the use of the three sons of the said James Corbett is hereby so conveyed and assigned to the said trustees and is to be held by them upon the express conditions that neither of said sons during their or either of their lives have power to mortgage sell alien charge or incumber any part of same and in the event of either of them so doing then and in that event the trustees shall stand possessed of the share of such son or sons so charging incumbering or parting with his share of said property hereby limited to him in trust for the other sons of the said James Corbett and to the entire exclusion of the son so selling or incumbering his share of the said property or any part thereof.”

On behalf of the respondent it is said that the property devised to him is not property on which a sum for the wife's maintenance can be secured, because he contends that by the very act of charging the property in question with such sum he would forfeit all his interest therein.

On the other hand the petitioner asserts that the estate devised to the respondent being an estate in fee simple the provision for forfeiture contained in the subsequent part of the instrument is invalid.

There is abundant authority for saying that if the devise to the respondent is that of an estate in fee simple the provision for forfeiture is void, as inconsistent with the right of alienation which is one of the incidents the law attaches to such an estate.

The question then is, what estate is given to the respondent

1888

CORBETT
v.
CORBETT.

Butt, J.

1888

CORBETT

v.

CORBETT.

Butt, J.

by this will? The different clauses of the document are inconsistent and contradictory, but I think it impossible to hold that the words of the devise give any estate other than an estate in fee simple to the respondent, and this notwithstanding the alleged devise over in case of the respondent dying unmarried and without issue. I am inclined to think that the true intent and meaning of that clause is to provide for the contingency of the death of one or more of the sons without issue in the lifetime of the testator. But if this be not the right construction of the words I should hold the devise over invalid as an executory devise abridging the estate in fee simple by altering the course of its devolution.

Such being the case, and the petitioner insisting on a decision on this point, I must hold that the respondent has property on which the wife's maintenance can be secured.

(2.) As to the amount. Having regard to the fact that there must in the ordinary course of things be intervals during which the respondent will not be in receipt of his full pay, and to the comparative smallness of his property to be charged, I think that 84*l.* a year will be a proper amount for him to secure for the maintenance of his wife.

I therefore order that the respondent shall to the satisfaction of the Court secure to the petitioner the annual sum of 84*l.* for her life.

That is my decision, but in view of the difficulty in determining the true meaning of the words of the will and of the obvious risk of further litigation involved in the execution by the respondent of a charge on the property, I would ask counsel on both sides to consider whether it would not be well to agree to an order under the 29 & 30 Vict. c. 32, for payment to the wife of the amount in monthly or weekly sums in lieu of charging her maintenance on the property in question.

Solicitors for the petitioner: *Wynne, Holmes, & Co.*

Solicitors for the respondent: *Pontifax, Hewitt, & Pitt.*

W. L.

[IN THE COURT OF APPEAL.]

OTWAY v. OTWAY.

OTWAY v. OTWAY AND HOFFER.

1888

April 30;
May 1, 8, 10,
11.

Divorce—Cross Petitions by Husband and Wife—Husband and Wife both found guilty of Adultery—Husband found guilty of Cruelty also—Judicial Separation—Right of Wife to Relief—Costs of Wife—Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 7, 16, 17, 22, 31.

A judicial separation can only be granted where the petitioner comes to the Court with a pure character, and is free from all matrimonial misconduct. Accordingly where a husband and wife had both been found guilty of adultery, and the husband had also been found guilty of cruelty, it was *Held* by the Court of Appeal, reversing the decision of Butt, J., that the Court had no jurisdiction to make a decree of judicial separation on the ground of such cruelty, however aggravated its character might be.

Drummond v. Drummond (30 L. J. (P. M. & D.) 177) approved.

A husband and wife who were married before 1882, presented cross petitions for dissolution of marriage, the wife's petition being presented before that of her husband. They were both found guilty of adultery, and the husband was also found guilty of cruelty of an aggravated character. The judge refused to decree dissolution of marriage, but granted the wife a decree for judicial separation, and gave her her costs. The husband having appealed, the Court of Appeal discharged the order for judicial separation:—

Held, that the wife was entitled, notwithstanding her adultery, to her costs both in the court below and on the appeal.

Seemle. If the wife had been herself the appellant, and had been unsuccessful, she would not have had her costs of the appeal.

Whether the Rules of the Divorce Court as to the wife's costs are applicable to women married since the Married Women's Property Act, 1882, *quære*.

THIS was an appeal from a decree of Butt, J. (1), upon cross petitions by husband and wife for dissolution of the marriage.

The facts are fully stated in the report of the decision in the Court below.

The learned judge found that both parties had committed adultery, and that the husband had also been guilty of cruelty of such a character that the wife ought not to be left at his mercy, and the children of the marriage ought to be protected from him. He accordingly granted a decree of judicial separation to the wife, and gave the wife her costs.

The husband appealed.

(1) Ante, p. 12.

1888

OTWAY

v.

OTWAY.

The wife's petition for dissolution was presented before that of the husband. The parties were married before 1882.

Lockwood, Q.C., Scarlett, and Lewis Edmunds, for the appellant. The adultery of the wife is a bar to all relief claimed by her in respect of any matrimonial offence committed by the husband. The point has never been decided since the Divorce and Matrimonial Causes Act, 1857, but there is no instance in which before that Act a decree for a divorce à mensâ et thoro was ever pronounced in favour of a wife who had been found guilty of adultery.

The Court has always acted upon the principle that none but persons of pure character, in other words, innocent parties, are entitled to relief: *Hall v. Hall* (1); *Foster v. Foster* (2); *Beeby v. Beeby* (3); *Astley v. Astley* (4); *Lord Leicester v. Lady Leicester*, cited in *Forster v. Forster*; *Grossi v. Grossi* (5); *Dysart v. Dysart* (6); *Boreham v. Boreham*. (7)

[*LOPES, L.J.*, referred to *Bancroft v. Bancroft* (8); and *FRY, L.J.*, referred to *Ousey v. Ousey*. (9)]

If reliance is placed on s. 31 of the Divorce and Matrimonial Causes Act, 1857, as giving the Court a discretion in a case like the present, the answer is that s. 31 only applies to decrees for dissolution of marriage, and that it leaves the Court no discretion where the adultery has formed the subject of a petition and the Court has found that adultery has been committed.

Bayford, Q.C., and *Abinger*, for the respondent, the wife. It has never been decided that a wife who gives sufficient proof of cruelty on the part of her husband is debarred from a divorce à mensâ et thoro by reason of her own adultery.

In *Chambers v. Chambers* (10), which was decided in 1810, Sir William Scott, afterwards Lord Stowell, said: "If the wife were prior petens in a suit of cruelty, I do not know that she would be barred by a recrimination of that species," i.e. adultery,

(1) 32 L. J. (P. M. & Ad.) 117.

(2) 1 Hagg. Consist. 144.

(3) 1 Hagg. Eccl. 789.

(4) 1 Hagg. Eccl. 714.

(5) Law Rep. 3 P. & M. 118.

(6) 1 Rob. Eccl. Rep. 106.

(7) Law Rep. 1 P. & M. 77.

(8) 34 L. J. (P. M. & Ad.) p. 70..

(9) Law Rep. 3 P. & M. 223.

(10) 1 Hagg. Consist. 439.

“for the consequences would be very different. The Court might not oblige her to cohabitation, which might be dangerous.”

In *Best v. Best* (1) it was stated by counsel in answer to inquiry from the Court, that there was no case in which an order had been made where cruelty was charged by the wife and adultery by the husband, and both charges were held to be proved.

It may therefore be taken that at the date of *Best v. Best* (1) there was no known decision debarring a wife who had established cruelty against her husband from relief on account of her own adultery, nor has there been any such decision since. But there have been judicial statements over and over again that it is an open question, with indications that if the case occurred for decision the Court would grant a decree of divorce à mensâ et thoro. For instance, in *Hall v. Hall* (2), Sir Cresswell Cresswell did not treat it as clear that a plea of adultery was an answer to a charge of cruelty, and in *Grossi v. Grossi* (3) Sir James Hannen said: “It has been contended that in no case can a wife who has been guilty of adultery obtain a decree of judicial separation on the ground of her husband’s cruelty. Many cases might be suggested in which a very serious wrong would remain unredressed if it were impossible for a wife in such a state of things to obtain the protection of this Court.”

If, then, the Court has the power, the present case is just the kind of case in which such a power ought to be exercised, i.e., one in which the cruelty is of such an intolerable character that the wife ought not to be left at the mercy of the husband and that the children ought to be protected from him. Upon these principles, the Court below, in the exercise of its discretion, made a decree for judicial separation. The Court as at present constituted acts upon the same principles as the Ecclesiastical Courts formerly did. It must be admitted that s. 31 of 20 & 21 Viet. c. 85, applies only to suits for dissolution of marriage; but it shews, at all events, that it was the policy of the Act to give a discretion to the Court. There is no valid reason why a discretion should be given in cases of divorce, and withheld in cases of judicial separation.

(1) 1 Adams, 411.

(2) 32 L. J. (P. M. & Ad.) p. 117.

(3) Law Rep. 3 P. & M. 118.

1888

 OTWAY
 v.
 OTWAY.

The Court, therefore, not being concluded by authority in the Ecclesiastical Courts, ought to hold that the discretion subsists in cases of judicial separation.

Scarlett, in reply. The Ecclesiastical Courts acted upon the principle that a person who applied for relief must come with clean hands, and not upon the principle of *compensatio criminis*, and so in the old cases where the husband and wife had both committed adultery, the *ratio decidendi* was not a set-off, so to speak, but that the guilt of each was a bar to relief in his or her favour: *Proctor v. Proctor* (1); *Harris v. Harris* (2); *Twining v. Twining* (3); *Hope v. Hope*. (4)

Cur. adv. vult.

COTTON, L.J. This is an appeal from a decision of Butt, J., and the question which we have to decide is one which in reality was not argued before him. The course which matters have taken is this. There being a petition by the wife seeking a dissolution of the marriage on the ground of adultery and cruelty on the part of the husband, and a cross-application by the husband seeking dissolution of the marriage on the ground of adultery by the wife; it was proved to the satisfaction of the judge that both the husband and the wife had been guilty of adultery, and it was proved that the husband had also been guilty of cruelty; and the judge held that the adultery of the husband prevented him from obtaining a decree for the dissolution of the marriage, and that the adultery of the wife prevented her from obtaining a decree for the dissolution of the marriage. Accordingly neither of the parties succeeded in the case which they brought before the Court. But although that was so, the learned judge thought that as it was proved that the husband had also been guilty of cruelty, the Court might grant, and ought to grant, a decree for judicial separation, in order to protect the wife from such cruelty, and in order to protect the children of the marriage from being left with the husband. But at the same time he intimated an opinion that there were great doubts as to whether the wife was much better than the husband. Now, in my opinion, we must

(1) 2 Hagg. Consist. 292.

(2) 2 Hagg. Consist. 376.

(3) 3 Hagg. Consist. 72.

(4) 27 L. J. (P. & M.) 43.

put aside all question as to the children, because they can be protected, and more effectually, by an application, in the matter of the infants, to the Chancery jurisdiction, where, if there are no members of the family willing to protect them from the evil consequences of being left under the charge of the husband, on a proper and sufficient case being made out an order would be made giving the care of the children to some person suitable to take charge of them. All we have to consider really is whether the Court could, in such a case, make a decree for a judicial separation, and I do not enter into any discussion as to the exercise of the jurisdiction in such a case.

Now the case is entirely under the Act of 1857, 20 & 21 Vict. c. 85, to several of the sections of which I shall have to refer. I need not refer to s. 31, which relates to proceedings for the dissolution of a marriage, but only to those sections under which the judge must have made this order. The first is the 7th: "No decree shall hereafter be made for a divorce *à mensâ et thoro*, but in all cases in which a decree for a divorce *à mensâ et thoro* might now be pronounced the Court may pronounce a decree for a judicial separation, which shall have the same force and the same consequences as a divorce *à mensâ et thoro* now has."

That was the only decree which could then be granted under the Act by the then Ecclesiastical Courts. Then we come to s. 16, which enacts that "A sentence of judicial separation (which shall have the effect of a divorce *à mensâ et thoro* under the existing law, and such other legal effect as herein mentioned) may be obtained, either by the husband or the wife, on the ground of adultery or cruelty, or desertion without cause for two years and upwards." The latter ground was a new ground introduced by the Act, and not one on which the Ecclesiastical Courts had acted. In the next place, s. 17 enacts that "Application for restitution of conjugal rights or for judicial separation on any one of the grounds aforesaid may be made either by husband or wife by petition to the Court . . . according to the rules and regulations which shall be made under the authority of this Act; and the Court to which such petition is addressed, on being satisfied of the truth of the allegations therein

1888

OTWAY

v.

OTWAY.

Cotton, L.J.

1888

OTWAY

v.

OTWAY.

Cotton, L.J.

contained, and that there is no legal ground why the same should not be granted, may decree such restitution of conjugal rights or judicial separation accordingly." Now there was a great deal of comment on that section as to what was the actual meaning of the words "on being satisfied of the truth of the allegations therein contained, and that there is no legal ground why the same should not be granted." But I think that is merely put in *ex abundanti cautela*, because we find from what has gone before in s. 7, and also from s. 22, to which I am about to refer, that the rules and practice of the Ecclesiastical Courts are to be followed; and a legal ground why a decree should not be granted would be something which, according to the rules and practice of the Ecclesiastical Courts, would have prevented a decree for judicial separation being granted.

We now come to s. 22, which is this:—"In all suits and proceedings other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act." Now, in my opinion, this section applies to the proceedings in which the order now appealed from was made; because the judge held that there was no ground on which he could grant a decree for dissolution of marriage to either party, and neither party has appealed against that decision. The decree for judicial separation, although made on a petition presented for dissolution under s. 31, must now be dealt with, having regard to the decision of the judge, as made in a proceeding other than that for dissolution of marriage, because it would be, in my opinion, wrong to hold that simply by filing a petition for dissolution of marriage, on which no decree for dissolution of marriage is made, you could alter the principles on which the Court acts so as to obtain relief by way of judicial separation, which you could not get upon a petition for judicial separation.

It was urged that s. 22 only refers to matters of practice and procedure; but, in my opinion, although the rules seem to amount to that, yet the point is not a matter of procedure but of principle.

The appeal to us has been simply on the ground that in this case the wife having been held to have been guilty of adultery she is in such a position that, having regard to the principles followed by the Ecclesiastical Courts, she could not have obtained a decree for a divorce à mensâ et thoro under the old law. A number of cases have been cited to us, by which it was laid down without any break at all that a husband guilty of adultery could not maintain any proceedings against the wife in the old Ecclesiastical Courts for a divorce à mensâ et thoro. But then it was contended that there is no decision of the old Ecclesiastical Courts that where a husband has been guilty of cruelty, the adultery of his wife will prevent her from obtaining relief in respect of that cruelty, and from obtaining a divorce à mensâ et thoro; and therefore that there is no reason to preclude the wife from coming to the Court in this case, and obtaining a judicial separation. As I have said, the matter was not at all argued before Butt, J., and therefore we have not the benefit of his consideration of the question. It is very true that there is no decision of the old Ecclesiastical Courts bearing on the question; but we have a decision exactly in point by Sir Cresswell Cresswell, in which, acting on the principles of the old Ecclesiastical Courts, he decided that although cruelty was proved, yet as the wife was guilty of adultery she could not get any decree for judicial separation as against her husband. That is the case of *Drummond v. Drummond*. (1)

That was a case which was very fully argued and considered by that learned judge, and what he says is this (p. 181):—"I assume that a case of cruelty was established against the Respondent, and a case of adultery against the Petitioner. Mr. Macaulay contended that I could not treat the adultery of the wife as any answer to a petition for judicial separation on the ground of cruelty, because otherwise the wife would be obliged to return to her husband and would be deprived of protection from his ill-treatment. But that has no bearing on the question, which is, whether a wife who has herself been guilty of adultery is in a position to be a petitioner in this court on account of a matrimonial offence committed by her husband. I think she is not.

(1) 30 L. J. (P. M. & D.) p. 177.

1888

OTWAY

v.

OTWAY.

Cotton, L.J.

1888
 OTWAY
 v.
 OTWAY.
 Cotton, L.J.

It has been decided if a wife sued her husband for a divorce à mensâ et thoro on the ground of adultery, and had herself been guilty of adultery, that she had no locus standi. In *Proctor v. Proctor* (1) the Court acted on the principle that a husband's adultery was a bar to a suit by him against the wife. The adultery here was committed after the commencement of the suit; but I am not aware of any case in which a wife who has been guilty of adultery has been considered to be entitled to relief."

We need not go into those cases; they are numerous, and all follow the same principle—that a husband guilty of adultery could not come into the Ecclesiastical Courts and obtain a decree against his wife. Now that is a decision of Sir Cresswell Cresswell dealing with this very point, and although not a decision of the old Ecclesiastical Courts, it is that of a judge of no ordinary ability acting in a matter where he had to decide on the principles of the old Ecclesiastical Courts, and that was his decision.

Now, is there really anything which ought to induce us not to follow that decision. Of course, we can overrule it if we think it is wrong; but what ground is there for complaining of it. As far as one can see the only ground is a dictum of Lord Stowell in *Chambers v. Chambers* (2), where he was dealing with a different matter. But there is one independent expression used by him (p. 451) which is relied upon to make us depart from the decision of Sir Cresswell Cresswell: "A remaining charge is that of cruelty, which is introduced rather incidentally, and was argued only on the supposition of the proofs of her innocence. But the Court holds her not innocent. On this plea the question might arise, whether a party would be entitled to bar her husband from his remedy of divorce for adultery, proved against her, by the plea of cruelty? I am inclined to think that she would not. It is certain that the wife has a right to say, 'You shall not have a sentence against me for adultery, if you are guilty of the same offence yourself.' The received doctrine of compensation would have that effect, because both parties are in eodem delicto; but this is not so in recrimination of cruelty. The delictum is not of the same kind. If the wife was the prior petens in a suit of

(1) 2 Hagg. Consist. 292.

(2) 1 Hagg. Consist. 439.

cruelty, I do not know that she would be barred by a recrimination of that species; for the consideration would be very different. The Court might not oblige her to cohabitation, which would be dangerous."

There, undoubtedly, Lord Stowell does seem to intimate that it was on a system of compensation of the two crimes, and that when it was not the same class of crime, (for instance, cruelty is not the same as adultery,) there could be no case of compensation.

That view of his as to why adultery is a bar in proceedings by the husband seeking a dissolution and divorce owing to the acts of his wife has not been adopted and is not approved by Dr. Lushington in the case of *Dillon v. Dillon* (1), where, in referring to this case, he says: "Now on referring to the cases I find it laid down in several of them that cruelty cannot be pleaded in bar to adultery. I myself so held in *Harris v. Harris* (2), and on referring to my own note of the judgment, I find that I relied upon the doctrine of Lord Stowell in *Chambers v. Chambers* (3), where he expressly lays it down as the general doctrine "that a wife cannot plead cruelty as a bar to divorce for her violation of the marriage-bed;" the reason he assigns for this is, that compensation can only arise where both parties are in eodem delicto, and that in the cases of cruelty and adultery the delictum is not of the same kind. I candidly say I entertain doubts whether the reason given is the most satisfactory that could be adduced; because if this effect arises out of the difference in the nature of the two offences, it follows, *è converso*, that where the wife has brought a suit on account of cruelty the husband cannot plead her adultery in bar, a proposition which I am not aware has ever been laid down in these courts. Perhaps the more correct, because the more satisfactory reason may be, that if the husband has been guilty of cruelty before the wife is charged with having committed adultery, she might have had redress by proceeding for a separation before the time when the adultery was committed. No cruelty can, as Lord Stowell has said, justify the violation of the marriage-bed." So that Dr. Lushington did not approve of

1888

 OTWAY
 v.
 OTWAY.

 Cotton, L.J.

(1) 3 Curt. 92.

(2) 2 Hagg. 411.

(3) 1 Hagg. Consist. 439.

1888

 OTWAY
v.
 OTWAY.

Cotton, L.J.

that which was incidentally said by Lord Stowell in *Chambers v. Chambers*. (1) In my opinion the true principle is this, that a wife having been guilty of adultery has put herself in such a position that she cannot be considered as an innocent party in any proceedings which might have been taken in the old Ecclesiastical Courts, or which might now be taken in the Court of Divorce; and therefore on that ground she is not in a position to come to that Court to give her any relief as to any matrimonial offence which the husband may have committed, or to put it on the ground of compensation for a crime of the same nature.

In my opinion it was a departure from the principles which have been acted upon by the Ecclesiastical Courts, and which ought to be acted upon the Court of Divorce in this case, to grant any relief to the wife in consequence of the cruelty of the husband when she herself has been found to be guilty of a breach of the matrimonial contract.

In my opinion, therefore, this order must be discharged; and the only consequences of the litigation will be that both petitions for the dissolution of the marriage must be dismissed.

FRY, L.J. In this case the wife petitioned against the husband, alleging both adultery and cruelty, the husband petitioned against the wife alleging adultery, and the wife recriminated and alleged that her husband had been guilty of adultery and connived at her adultery. The learned judge found that adultery had been committed by the husband and the wife, that the cruelty of the husband had been proved, but that his connivance at the wife's adultery had not been proved. In that state of things he granted a judicial separation. Was it competent for him to do so is the question which has now to be solved. The jurisdiction of the Court depends of course upon the construction of the Act. In my opinion the 7th and 22nd sections of the Act of 1853 define the jurisdiction of the Court in this matter. [The Lord Justice read those sections and continued:—] The true inquiry therefore is whether, having regard to the principle and rules on which the Ecclesiastical Courts acted before the year 1857, a decree for a divorce à mensâ et thoro could be pronounced in this case.

(1) 1 Hagg. Consist. 439, 451.

The case is one which, it appears to me, ought to be considered with great care, because it is impossible not to feel a strong sense of repulsion at continuing the marriage tie between an adulterous man and an adulterous woman, where the man has been guilty of cruelty of the description of which the respondent in this case has been guilty. And further, one could not help considering the interest of the children, because the jurisdiction of the Court of Chancery in such matters is confined to the case of children who are possessed of property, although in the present case I have no doubt the children have sufficient property to make them subject to that jurisdiction.

It was urged upon us that the cases in the Ecclesiastical Courts proceeded on the doctrine of compensation, and not upon the simple doctrine of the necessity of a petitioner to the Ecclesiastical Courts coming with clean hands, but having considered the cases I have arrived at the same conclusion as Cotton, L.J. It is to be borne in mind that not a single case can be found in which a decree of divorce à mensâ et thoro has been pronounced in favour of a wife who has been guilty of adultery. Lord Stowell, no doubt, in *Chambers v. Chambers* (1) expressed a doubt as to whether a decree might not be pronounced where the husband was guilty of cruelty; but Dr. Lushington in *Dillon v. Dillon* (2) expressly dissented from that intimation of opinion on Lord Stowell's part. Since the passing of the Act of 1857 the point has been fully discussed and considered in the case of *Drummond v. Drummond* (3) in which the Judge Ordinary arrived at the conclusion that the adultery of the wife was a bar to any relief. The conclusion I have arrived at is that the principles which formerly governed the old Ecclesiastical Courts ought to prevail now, one of which is not to pronounce a decree for a divorce à mensâ et thoro in favour of an adulteress. In this case the wife not having suggested by way of counter appeal or by way of counter notice that she is entitled to any relief in respect of a dissolution of marriage, it appears to me that the only result must be that both petitions must be dismissed.

1885

OTWAY

v.

OTWAY.

Fry, L.J.

(1) 1 Hagg. Consist. 439.

(2) 3 Curt. 92.

(3) 30 L. J. (P. & M.) 177.

1888

OTWAY

v.

OTWAY.

LOPES, L.J. The question in this case is whether a wife found guilty of adultery is entitled to a decree for judicial separation against a husband found guilty of adultery and cruelty; or, in other words, does the adultery of the wife disentitle her to relief in the shape of a judicial separation? In order to determine that question, it is necessary in the first place to consider the Divorce and Matrimonial Causes Act, 1857. The 31st section of that Act relates only to a dissolution of marriage, and in my opinion has no bearing on the case now before the Court. A suit of judicial separation, which practically this suit is, is left as it was before the passing of the Act of 1857, except that sect. 16 introduces a new ground, viz., "desertion without cause for two years and upwards." A consideration of sects. 7, 16, 17 and 22 leads me to this conclusion.

The result is that in determining the question in this case we must have regard to the law as it existed before the Act of 1857. Now the authorities seem to me clearly to lay down that if a wife sued her husband for adultery and had herself been guilty of adultery, she was not entitled to any relief. That doctrine applies in this case, unless it can be maintained that the fact of the husband having been found guilty of cruelty as well as of adultery entitles the wife to relief when, but for the cruelty, she would have had no locus standi. I can find no authority for this proposition, and it is opposed to what I believe to be the principles upon which the Ecclesiastical Courts have acted in granting decrees for a divorce à mensâ et thoro, viz., that a wife or husband seeking such relief must come to the Court with a pure character, and must be free from any matrimonial misconduct. *Drummond v. Drummond* (1) is a strong authority in this direction. In that case the authorities in the Ecclesiastical Courts were brought to the attention of Sir Cresswell Cresswell, and were fully considered by him. I think the learned judge below had no jurisdiction to order a judicial separation.

Appeal allowed.

W. W. K.

1888. May 10. The case was mentioned again upon the question

(1) 30 L. J. (P. & M.) 177.

whether the wife, the unsuccessful respondent, ought to have her costs in the court below and in the Appeal Court.

1888

 OTWAY
v.
OTWAY.

Abinger, (*Bayford, Q.C.*, with him) for the wife. The rule of the Divorce Court has always been that a wife should not be precluded by want of means from establishing her case either as petitioner or respondent. If the wife is unsuccessful it is in the discretion of the judge to allow the wife's costs under rule 159, and they are always allowed unless the solicitor has conducted the proceedings improperly: *Chaldecott v. Chaldecott* (1); *Ellyatt v. Ellyatt* (2); and these costs are not confined to the sum for which the husband has given security: *Robertson v. Robertson*. (3) The costs of the appeal ought to follow the same rule; it would be equally a denial of justice to refuse the wife the means of asserting her rights in the one case as in the other. The fact of her having been found guilty of adultery makes no difference, especially as she is not the appellant, but was brought into the Appeal Court by her husband: *Holt v. Holt*. (4)

Scarlett, (*Lockwood, Q.C.*, and *Lewis Edmunds*, with him) for the husband. The discretion given to the judge by rule 159 was not exercised; for no special application was made for costs by the wife at the time of trial: *Keats v. Keats*. (5) She can only be entitled to the amount secured by her husband; if that was not enough she might have applied for an increase before the trial. The reason of the rule as to costs was that a married woman could hold no property of her own, but that reason does not apply in the same degree since the passing of the Married Women's Property Acts. With respect to the costs of the appeal the wife had been found guilty of adultery at the trial and was wholly unsuccessful on the appeal, and in such circumstances there is no precedent for allowing her costs. In *Robertson v. Robertson* (3) the wife's costs of appeal were not allowed, so far as she was unsuccessful.

Abinger, in reply.

COTTON, L.J. This was an application by the respondent on

(1) 29 L. T. (N.S.) 699.

(3) 6 P. D. 119.

(2) 3 Sw. & Tr. 503.

(4) 28 L. J. (P. & M.) 12.

(5) 1 Sw. & Tr. 334.

1888

OTWAY
v.
OTWAY.

Cotton, L.J.

the appeal with reference to the costs both of the appeal and of the proceedings in the Divorce Court, and we stated it as our opinion that in a case like this, where both husband and wife have brought cross petitions and have both been guilty of adultery, we should make the order on the appeal brought by the husband without giving any costs either of the appeal or of the proceedings in the court below; but when we intimated that opinion we gave an opportunity to the counsel for the wife to consider the matter and bring it before us, and in my opinion, after hearing the arguments, we came to a wrong conclusion, and we ought to allow her the costs of the proceedings in the court below and also the costs in the appeal. The general rule is this, although the Regulation 159 is that there shall be no costs in a suit for dissolution where the wife has been found guilty of adultery, except what at the hearing the judge who tries it in his discretion allows her, yet, as a rule, unless it has been proved that there is some reason why costs should not be allowed, provision is made for the wife's costs, both in defending herself and in bringing her case against her husband, by ordering the husband to provide those costs; in fact, to pay them. Formerly it was only to pay such costs as had been previously estimated before the trial proceedings, but the Court of Appeal in *Robertson v. Robertson* (1) decided that where the wife was allowed costs, and where there were no improper proceedings taken on her behalf, the costs should be not the estimated costs but the actual costs incurred by her. That seems to be the rule, and in my opinion, subject to what I have to say as regards rule 159, and as regards the late Acts altering the position of married women, we ought to follow that rule. Rule 159 refers to the discretion of the judge in the exercise of the power on the hearing. We have not heard the case, and it was said that the judge ought to have exercised his discretion, and we cannot exercise our discretion for him and allow her any costs. But in my opinion the judge has exercised a discretion as regards the costs, because he made an order on the wife's petition, and dismissed the husband's petition, but allowed the wife all the costs of defending herself against the husband's petition. In that he clearly exercised his discretion.

He was not asked to do so, but there is an implied request on behalf of a litigant to whom the judge can give costs which justifies the judge in giving that person costs.

It is very true that he did not give the wife her costs on the footing of her petition for dissolution being dismissed, but although he made an order on that petition which, in our opinion, he could not make, yet he did shew that in his opinion there was nothing to prevent him, so far as it was a matter of discretion for him, though it was a petition for dissolution, from allowing her her costs. So there, I think, we have the discretion of the judge exercised at the hearing as regards the wife's costs.

Then, as regards the appeal, I doubted very much whether we ought to allow any costs of the wife on the appeal, we having decided against her on the ground that she had already been found guilty of adultery before any of the proceedings in the appeal were taken. But I think the case we have been referred to of *Holt v. Holt* (1) settles that question. If, after she had been found guilty of adultery she had herself actively brought the matter before this Court, then I should have thought no provision ought to be made for her costs; but here she was only defending herself against a proceeding taken by the husband, and that being so, I think that, following what is laid down in *Holt v. Holt* (1), it was reasonable for her to instruct a solicitor and counsel to appear. Therefore, although her adultery prevented her from pledging the credit of her husband, and prevented her getting any alimony or allowance from the husband, yet, in my opinion, it does not prevent her from requiring her husband to provide for the costs reasonably incurred in bringing her case against his appeal before the Court. Therefore I think we ought to allow her her costs of this appeal, as well as the costs of the proceedings in the Divorce Court.

There is one point I said I should mention, namely, with reference to the recent legislation as to the position of married women. If this marriage had been after the Act of 1882, we should have had to consider how far that old rule would apply where a woman was put, after that Act, in the position of a feme sole, retaining all her property, and being in a position to sue

1888

OTWAY

v.

OTWAY.

Cotton, L.J.

(1) 28 L. J. (P. & M.) 12.

1888

OTWAY

v.

OTWAY.

Cotton, L.J.

and be sued. But these parties were married in 1879, before that Act, and although a married woman, married before that Act, does retain a right to property which comes to her after the passing of the Act, and though under the Act of 1870 she has a right to certain property which came to her after the Act, we do not know that she had any such property, and, therefore, in my opinion, we must decide this case independently of the position of a married woman under the recent legislation. If a case comes before us where a married woman has been married after the Act of 1882, it will be a very serious question for consideration how far we ought to follow the old rule, or what decision we ought to give. I only mention that to shew that it does not in the present case, I think, affect the decision, and we do not in any way fetter ourselves by the present decision as regards any case which may arise as regards a woman married after the Act of 1882.

FRY, L.J. I agree with all that has been said by the Lord Justice.

LOPES, L.J. I entirely agree, and desire to add nothing further than this. As to what the effect of the Married Women's Property Acts may be on the principle which was considered of binding force with regard to the wife's costs in cases of this description, where the woman has been married since the passing of the Act of 1882, I say nothing. It is a matter which probably will have to be considered at a future time.

Solicitor for the husband : *M. Abrahams.*

Solicitor for the wife : *Norman.*

M. W.

THE MOORCOCK.

1888

Ship—Damage—Jetty in Tidal River—Vessel of Necessity grounding—Implied Representation by Wharfinger.

July 18.

The defendants, who were wharfingers, agreed with the plaintiff for a consideration to allow his vessel to discharge and load her cargo at their wharf, which abutted upon the River Thames. It was necessary in order that the vessel might be unloaded that she should be moored alongside a jetty of the defendants which ran into the river, and that she should take the ground with her cargo at the ebb of the tide. The vessel at the ebb of the tide sustained injury from the uneven nature of the ground. The bed of the river at the point where she took ground was vested in the Conservators, and the defendants had no control over it, but it was admitted that they had taken no steps to ascertain whether it was suitable for the vessel to ground upon :—

Held, that there was an implied undertaking by the defendants that they had taken reasonable care to ascertain that the bottom of the river at the jetty was not in a condition to cause danger to the vessel, and that they were liable for the damage sustained by her.

ACTION OF DAMAGE tried by consent by Butt, J., sitting as a judge of the High Court of Justice exercising Admiralty jurisdiction, with two of the Trinity Brethren as assessors.

The plaintiff was the owner of the steamship *Moorcock*, and the defendants were wharfingers possessed of the wharf abutting on, and a jetty extending into, the River Thames known as St. Bride's Wharf, Wapping.

In November, 1887, after some correspondence and several interviews, the plaintiff and the defendants agreed that the plaintiff's steamship *Moorcock* should be discharged and loaded at the defendants' wharf, and for that purpose should be moored alongside the defendants' jetty, and so take the ground at low tide. There was a conflict of evidence as to what passed at these interviews with reference to the safety of the vessel when grounding. The effect of the evidence on this point is stated in the judgment.

No charge was made by the defendants in respect of the vessel being moored alongside or lying at the jetty, but the plaintiff paid for the use of the cranes in discharging the cargo, and rates were payable to the defendants on all goods landed on or shipped from or stored on the wharf.

1888

THE
MOORCOCK.

On December 14, 1887, the *Moorecock*, in order to discharge her cargo, was moored alongside the end of the jetty. As the tide ebbed, and she ceased to be waterborne, she sustained damage owing to the centre of the vessel settling on a ridge or saddle of hard ground whilst the ends were not so supported.

In answer to interrogatories the defendants, inter alia, denied that they had the management or control of the bed or soil on which the ship sat when she took the ground. They admitted that they had not taken any steps to ascertain whether the ground was level and suitable for such a vessel as the *Moorecock* to ground upon, except that in September, 1877, with the sanction of the Conservators of the River Thames obtained by the defendants in writing on June 10 previously, the bed of the river outside the jetty had been levelled by the owners of the adjoining wharf, and it appeared from the evidence that this was done in consequence of the propellers of steamers in going alongside the adjoining wharf causing a depression in the bed at the south end of the defendants' jetty.

Barnes, Q.C., and *W. S. Robson*, for the plaintiff. The defendants' premises could not, in the ordinary course of business, be used without the vessel lying at them grounding at low water, and it must therefore be taken to have been part of the contract that the bed of the river adjoining the jetty was reasonably safe for a vessel to lie on, or at any rate, the plaintiff was entitled to warning if it was not safe: *White v. Phillips*. (1)

Finlay, Q.C., and *Hollams*, for the defendants. By the Thames Conservancy Act (20 & 21 Vict. c. cxlvii.) of which the material parts are ss. 50, 53, 54, 57, 86, 87, the soil of the River Thames is vested in the Conservators, who are empowered to grant licences for the making of jetties. The owner of a jetty erected under such a licence is not, however, responsible for the condition of the bed of the Thames, which, as a navigable river, is a public highway as free to the plaintiff as to the defendants.

BUTT, J. The owner of the steamer *Moorecock*, when looking about for better conveniences for discharging the cargoes which

1888

THE
MOORCOCK.

the vessel was in the habit of bringing from Antwerp to London, came to the conclusion that St. Bride's Wharf, belonging to the defendants, was convenient for his purpose, and he accordingly put himself in communication with the defendants, through his loading brokers, and the result was a negotiation as to the discharge and loading of this vessel at St. Bride's jetty. No doubt the arrangement come to was one intended for the mutual benefit of the two parties to it, and therefore, whatever the promises or engagements on one side or the other were, there was good consideration for them. The vessel arrived at the jetty, and was moored, apparently properly, alongside. She had a cargo of considerable weight on board, and as the tide ebbed she settled down on the ground, becoming less and less waterborne, a strain was put on her from the uneven nature of the ground, a crack or a loud noise was heard, and it turned out that, in effect, she had broken her back. Under these circumstances the plaintiff says he is entitled to recover the damages so occasioned from the defendants, and he puts his case in several ways. First, he says there was a warranty that the place was safe and suitable for his vessel to be in. I do not think there was any such warranty. Then he says there was an express representation made by the managing director of the defendant company that the place was a suitable place and therefore a safe place for the vessel to take the ground with her cargo, and upon that there has been to some extent a conflict of evidence, the result of which is that I am by no means satisfied that there was an express representation that the place was safe or suitable for the ship. I think so far as express representation went, it came pretty much to this, "Is the place a good one?" perhaps the word "suitable" was used, "Well there is a vessel of the same size as yours, or thereabouts, lying there now, come and see," and they went and they saw a vessel of very nearly the same size, fully the same length, although not quite the same dimensions in other respects. Then the *Moorcock* was taken there. In the result, not only on the warranty, but on the allegation that an express representation was made of the suitability and safety of this place, I think the plaintiff fails. But now comes a question which, to my mind, is much more difficult. It is clear that the use of these defendants'

1888

THE
MOORCOCK.

premises by the owner of the *Moorcock* could not be had without mooring the vessel alongside the jetty, and without her taking the ground at the jetty, it seems to me therefore that the defendants must be taken by implication to have represented at least this much: that they had taken reasonable care to ascertain that the bottom of the river at the jetty was in such a condition as not to endanger the vessel using their premises in the ordinary way. They had not done so in fact. I must therefore hold the defendants liable, and refer the damages to the registrar.

Judgment for the plaintiff.

Solicitors for plaintiff: *T. Cooper & Co.*

Solicitors for defendants: *Hollams, Son, & Coward.*

E. S. R.

July 16.

[DIVISIONAL COURT.]

THE AGLAIA.

Salvage—Pilotage.

In an action for salvage it appeared that on March 20, about 11 A.M., the plaintiffs' fishing-smack fell in with the defendants' vessel, which was shewing an English Jack flag in her rigging, in the North Sea, forty miles from Lowestoft. The crew of the vessel were suffering from frost-bite, the helmsman in consequence steering with one hand. They were also short of provisions. They told the master of the smack that they wished to be piloted to the nearest port, the vessel being at this time out of pilotage waters, and he agreed to take and took the vessel to Great Yarmouth:—

Held, that even assuming that the signal exhibited by the defendants' vessel was ambiguous, the assistance rendered to her was in the circumstances a salvage service, and that the plaintiffs were entitled to remuneration accordingly.

APPEAL from a decision of the judge of the County Court of Norfolk, holden at Great Yarmouth, in an action of salvage. The learned judge on the evidence for the plaintiffs held that the performance of a salvage service had not been established. From this decision the plaintiffs appealed.

Subsequent to the hearing of the case in the court below the evidence of the defendants was taken before a commissioner, but it was not used on the hearing of the appeal.

The facts, as appearing from the plaintiffs' evidence, were that the trawler *Mizpah*, of which the owner, master, and crew were plaintiffs, with a crew of five hands, on March 20, in the North Sea, forty miles from Lowestoft, which bore W.N.W., about eleven o'clock in the morning perceived the *Aglaiia* shewing an English Jack flag in her rigging. Upon speaking the *Aglaiia* the master of the trawler was told that those on the *Aglaiia* wished to be piloted to the nearest port; the vessel was not then in pilotage waters. The master of the *Mizpah* offered to take them to Great Yarmouth, which offer was accepted. At the request of the master of the *Mizpah* some provisions were sent on board of her, her crew being short of them. The crew were in a very bad state, ill and suffering from frost-bite. The *Mizpah* and the *Aglaiia* reached Yarmouth about 11 P.M. on March 20.

1888
THE AGLAIA.

Sir Walter Phillimore, for the appellants. The county court judge was wrong in refusing to award salvage. There was assistance by advice as to the course to be taken by the defendants' vessel, which gave a right to salvage: *The Eliza*. (1) Pilotage assistance when a vessel is out of pilotage waters is assistance in the nature of salvage: *The Hedwig*. (2)

Aspinall, for the respondents. The county court judge was right. Some danger to the defendants' vessel ought to have been proved: *Akerblom v. Price*. (3) The *Aglaiia* was not in danger. The signal exhibited was not one of distress.

THE PRESIDENT. We are of opinion that the learned county court judge has not given sufficient weight to the condition of the vessel when the services, the subject of this action, were rendered to her.

In order to found a claim to a salvage reward the vessel to which the services are rendered must have been in distress, and the amount of the danger in which she was is a question to be considered as affecting the amount of the award. In the present case the *Aglaiia* was in distress, many of the crew were suffering from frost-bite, and the helmsman was in consequence actually steering with one hand. It is clear, therefore, that this crew

(1) Lush. 536.

(3) 7 Q. B. D. 129.

(2) 1 Spk. 19.

1888

THE AGLAIA

was suffering from the effect of previous hardships. The vessel, too, was short of provisions. Therefore the circumstances lay a foundation for a valid salvage claim. It has been argued that the *Aglaiia* was bound for the Downs and could have reached them without assistance, but the crew were not of this contented mind, and asked to be conducted to the nearest port. At this time, too, the *Aglaiia* was out of pilotage waters. Therefore why did she need help? Because the crew were, it would seem, not sure of their position, otherwise they would have steered for Yarmouth. Then there was an ambiguous signal exhibited from the *Aglaiia*, shewing that assistance of some kind was required. To interpret that signal we must—as has been more than once decided—look to the ultimate event and see what the signal really meant. Here the circumstances shew that assistance was needed. The main assistance which was given by the smack to the *Aglaiia* was to guide her to Yarmouth. This was pilotage under extraordinary circumstances, and I am clearly of opinion that the guidance of a vessel by a person not a pilot under extraordinary circumstances—no matter by what term it is designated, whether by the term “pilotage” or “salvage”—rises to the rank of a salvage service. I therefore hold on principle that the plaintiffs rendered a salvage service and that this appeal must be allowed.

BUTT, J., concurred.

By agreement between counsel the amount of salvage reward was agreed at 50*l*.

Appeal allowed.

Solicitors for appellants: *Ingledew, Ince, & Colt.*

Solicitors for respondents: *Dubois, Reid, & Williams.*

E. S. R.

THE ERATO.

1888

Salvage—Award.

June 29.

A vessel having got ashore on the Parkin Rock in the Red Sea, her master and part of the crew proceeded to Aden for assistance. During their absence the crew left on board were driven away by Arab wreckers, but the vessel was never permanently abandoned. Three steamers rendered valuable services to the vessel, and finally succeeded in getting her off the rocks and saving part of her cargo. The value of the vessel for the purposes of the action was taken to be 3750%.

The Court awarded 2000% as salvage. (1)

ACTION of salvage. The defendants were the owners of the steamship *Erato*, which vessel, on August 21, 1887, was stranded on the Parkin Rock in the Red Sea, about sixty miles to the north and west of Perim.

The plaintiffs were the owners of the steamships *Pheasant*, *Midge* and *Somali*. The services of the respective salvors were shortly as follows. The *Pheasant* was a screw steamship of 253 tons net and 400 tons gross register. On August 28 the *Pheasant*, intelligence of the stranding of the *Erato* having reached Aden, was despatched thence with pumps and 136 labourers and boatmen, together with a crew of twenty hands.

The *Pheasant* reached the *Erato* at 9 A.M. on August 29, and lay-to for the night, and next day steamed close to the wreck, and work was done by the divers, preparations were made to patch the holes in the vessel's bottom, and the men were at work jettisoning the cargo of wheat, and pumps were got on board and worked. On September 6 an attempt was made to move the *Erato*, the *Pheasant* being lashed alongside, but in this attempt the *Erato* canted to the eastward, causing the *Pheasant* to strike on a rock, and she at once began to fill.

The coolies and some stores were sent on board the *Erato*, and then the *Pheasant* settled down till the water was level with her deck, and on sounding she was found to be fast on the rocks. About 1 P.M. on the same day the *Erato* was got off the rocks and taken by some of the men who had come on the *Pheasant* to

(1) See *The Inca*, Swa. 370, 12 Moo. P. C. 189.

1888

THE ERATO.

Perim. On September 11 the *Pheasant* was clear of water, and on the 16th she was got off the rocks and taken to Aden. Her repairs costs 4700*l.*, and there was also additional expense in consequence of getting on the rocks.

As regards the steam-tug *Midge*, of 35 tons gross and 19 tons net register, she found the *Erato* on the rocks on August 25, having set out in search of her from Perim on August 23. The crew of the *Erato* had been for a time driven off her by the Arabs. Some of the cargo was taken by the *Midge* to Perim. On August 28 the *Midge* returned with more coolies and a donkey-pump, with which latter engine the after-holds and the cabin of the *Erato* were cleared. On August 30 those on board the *Midge* laid out a kedg anchor, by the assistance of which and her own engines the *Erato* was finally enabled to get off the rocks.

As regards the *Somali*, a steamship of 383 tons register and engines of 380 effective horse-power, when she reached the *Erato* on August 25, her services having been obtained at Aden by the captain of the *Erato*, a band of Arab wreckers were plundering the vessel. The presence of the *Somali* caused them to cease their depredations. With the sanction of the captain of the *Erato* the captain of the *Somali* brought a gang of labourers and appliances for saving the vessel. The *Somali*, with considerable risk, was brought alongside the *Erato* and her crew proceeded to jettison the cargo. The *Somali* subsequently took some of the sound cargo to Aden and then returned to the wreck, and her crew did much work in jettisoning the damaged cargo, which had to be taken out of the holds, in which it was difficult to work owing to the noxious gases emitted by the cargo. On September 1 the *Somali* had to be cut adrift from the *Erato* owing to the bad weather, and finally left the wreck at midnight on that day fully loaded with sound cargo saved from the *Erato*.

The value of the *Erato*, which had never been abandoned by the master and crew, when the services were rendered, was fixed by the registrar for the purposes of the action at 3750*l.*, and the defendants tendered and paid into Court the sum of 1500*l.*

Sir W. Phillimore, and *Aspinall*, were for the *Pheasant*.

J. Walton, was for the *Midge*.

Kennedy, Q.C., was for the *Somali*.

Barnes, Q.C., and *Raikes*, were for the defendants.

1888

THE ERATO.

BUTT, J. In this case we are clearly of opinion that a salvage service of great merit has been rendered by each and every one of the several claimants. But I regret that from the want of an adequate fund I am unable to make the award which I should like to do. I have to deal only with the salvaged ship, for though some cargo has been saved, the chief salvor—the *Pheasant*—had nothing to do with the salvaging of it and her owners cannot proceed against it.

The salvage was begun by the *Somali*, and her service was a valuable one, though it was rendered principally to the cargo, which she carried away and saved. But there is no doubt that at the time she came up, or just preceding it, the Arabs had been in possession of the *Erato*, and they would not have left her if the *Somali* had not then arrived.

Having, then, to deal with a fund amounting only to 3750*l.*, the question arises how much of it I should award to the salvors. It is said by the defendants that 1500*l.*, the amount which they have tendered, is sufficient, because it is more than a third of the value of the property saved: it is true also that in awarding salvage the Court must not, so to speak, confiscate the property saved. On the other hand I hold that there is no hard and fast rule as to the proportion of the saved property which ought to be awarded to the salvors. I shall proceed therefore to consider what portion of the property saved I should give to the salvors, not as an adequate remuneration, but as the lowest amount which in justice they ought to receive. I cannot award them less than 2000*l.*

As regards the apportionment of that sum, the first of the salvors in point of time was the *Somali*: though meritorious her services were chiefly directed to the salvage of the cargo, though, no doubt, they had some effect on the saving of the ship. But the owners of this vessel are in this peculiar position, they have a lien on nearly 500 tons of cargo, and will no doubt receive from it a handsome reward, in which the others cannot share, excepting

1888

THE ERATO.

that the owners of the *Midge* will get a very small proportion of the salvage from the cargo. In apportioning the amount to the *Somali* I am supposing that her owners will be better off than any of the other salvors. I shall therefore award her 350*l*. The *Midge*, though small in size, was a very active salvor, and as all the cargo she saved was 440 bags, I shall award her 500*l*. The balance, namely 1100*l*., remains for the owners of the *Pheasant*. I regret that in rendering the service which she did she was injured to the extent of several thousand pounds. It has been urged on behalf of the defendants that she had been insured by her owners for the purposes of this salvage; but I decline to go into that matter.

Solicitors for owners of the *Pheasant*: *T. Cooper & Co.*

Solicitors for owners of the *Somali*: *Stokes, Saunders & Stokes.*

Solicitors for owners of the *Midge*: *Pritchard & Sons.*

Solicitors for defendants: *Waltons, Bubb & Johnson.*

E S. R.

June 6.

[IN THE COURT OF APPEAL.]

HYDE v. HYDE.

Divorce—Married Woman—Custody of Children—Sequestration—Enforcing Order—Summoning Persons to give Information—Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 35, 52.

A husband having obtained a decree nisi for divorce, an order was made for the wife to give up his children to him. This order was not served upon her personally, but it appeared that she knew of the order and had kept out of the way to avoid service. The children were not delivered up, and the father could not discover where they were. A further order was thereupon made for a sequestration to issue against the estate of the wife, and directing her mother, sister, and brother-in-law, who were shewn to be in communication with her, to attend to be examined as to their knowledge of the whereabouts of the wife and children. The wife was entitled under her marriage settlement to an income for her separate use with a restraint on anticipation:—

Held, by the Court of Appeal, first, that the sequestration was properly issued without personal service of the previous order; secondly, that it was no objection to the form of the writ of sequestration that it was in general terms without expressly defining the property of the wife which was subject to sequestration; thirdly, that the sequestration could not during the coverture

be enforced against future income, as to which the wife was restrained from anticipation, but that it applied to arrears which were due when the order for sequestration was made :

1888

 HYDE
 v.
 HYDE.

But *held*, that there was no jurisdiction to order the mother, sister and brother-in-law to attend and be examined as to their knowledge of the whereabouts of the wife and children, for that s. 52 of the Divorce Act, 1857 (20 & 21 Vict. c. 85), which provides that an order of the Divorce Court shall be enforced in the same way as an order of the Court of Chancery, does not enable the Divorce Court to exercise a power of obtaining discovery in aid of the execution of its order which the Court of Chancery had never exercised, except in reference to wards of Court, and s. 35, though it gave the Divorce Court powers as to the maintenance and education of the children of the parties, did not make them wards of that Court, and although it might give jurisdiction to summon persons to give evidence if there was any issue to be tried as to the maintenance and education of the children, did not give power to call upon them to give information where there was no issue to be tried.

APPEAL from an order of Butt, J., in a husband's petition for divorce, declaring the wife in contempt for not complying with an order for the delivery up of her children to her husband (the petitioner), and directing a writ of sequestration to issue against her property, and commanding certain persons to attend the court in order that they might be examined as to their knowledge of the whereabouts of the respondent and her children.

It appeared that by a settlement dated October 31, 1881, made on the marriage of the petitioner and the respondent, the respondent was entitled for life to the income of her own fortune for her separate use, without power of anticipation.

On December 17, 1887, an order nisi for a divorce was made on the petition of the husband.

On December 21, 1887, an order was made by the President that the respondent should deliver up into the custody of the petitioner their two children, and should be restrained from taking them or either of them out of the jurisdiction.

This order was never served personally on the respondent, but the Court came to the conclusion on the evidence that she knew of it, and kept out of the way to avoid service.

The children were not delivered up, and the petitioner could not discover where they were. On May 15, 1888, he obtained ex parte an order calling on the respondent to shew cause why the Court should not grant an injunction restraining her from in any way dealing with, incumbering, or parting with her interest

1888

HYDE

v.

HYDE.

under her settlement; make a declaration that she was contumacious and in contempt for not delivering up the children; order a sequestration to issue against her estate and effects, and her interest under her marriage settlement; and direct Mrs Rowley (the respondent's mother) and Mr. and Mrs. Felgate (brother-in-law and sister of the respondent) to attend and be examined as to their knowledge of the whereabouts of the respondent and her children. Substituted service of this order was authorized.

On May 23, 1888, Butt, J., made an order that the respondent be declared contumacious and in contempt for not delivering the children to the petitioner, and "that a writ of sequestration do issue against the estate and effects of the said respondent," and that Mrs. Rowley and Mr. and Mrs. Felgate should attend at a given time "to be examined before the Court as to their knowledge of the whereabouts of the said respondent and the said children."

There was uncontradicted evidence that Mrs. Rowley and Mrs. Felgate were in communication with the respondent.

Under this order a writ of sequestration was issued, authorizing the sequestrators "to enter upon all the messuages, lands, tenements, and real estate whatsoever of the respondent, and to collect, receive, and sequester into your hands not only all the rents and profits of her said messuages, lands, tenements, and real estate, but also all her goods, chattels, and personal estate whatsoever," and directing them "to go to and enter upon all the messuages, lands, tenements, and real estate" of the respondent, and "collect, take, and get into your hands, not only the rents and profits of her said real estate, but also all the goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands until the respondent shall clear her contempt, and our said Court make other order to the contrary."

At the time of this order some arrears of the income payable to the respondent under her settlement were in the hands of the trustee.

The respondent appealed from the order of May 23, and the appeal was heard on June 6, on which day the children were made wards of Court in the Chancery Division.

Cozens-Hardy, Q.C., and *Lewis Coward*, for the respondent. First, no sequestration ought to have issued, inasmuch as there never was personal service of the order. The Divorce Act, 1857, s. 52, provides that orders are to be enforced in the same way as those of the Court of Chancery. The Chancery practice is now governed by Order XLIII., r. 6.

[BOWEN, L.J. The rules of 1883 do not apply to the Divorce Court. See Order LXVIII., r. 1.]

If the case is governed by the old practice of the Court of Chancery, personal service was always required to found process of contempt. There having been no personal service, attachment cannot issue, nor, therefore, a sequestration. In *Allen v. Allen* (1) sequestration was ordered, though there had been no personal service, but it was done on the ground that the respondent was evading service.

[The evidence was discussed, and the Court held it sufficient to shew that the respondent had kept out of the way to avoid service.]

Secondly, the order for sequestration is wrong in form. The proper form is that in *Scott v. Morley* (2), restricted to property which the wife is not restrained from anticipating. The Court cannot override the restraint on anticipation: *In re Glanvill, Ellis v. Johnson*. (3) In *Claydon v. Finch* (4) it was held that arrears of separate income could be sequestered, but the order in the present case would empower the sequestrator to receive future income. What cannot be alienated cannot be sequestered: *Fenton v. Lowther*. (5)

[FRY, L.J. What was the form of sequestration in use in 1857?]

Miller v. Miller (6) seems to shew that it was a limited form.

Thirdly, supposing the sequestration right, the order for examination, as to the validity of which Butt, J., expressed great doubt, cannot be supported: *Irwell v. Eden*. (7) Orders of this kind have often been made in Chancery in cases relating to wards

1888

HYDE

v.
HYDE.

(1) 10 P. D. 187.

(2) 20 Q. B. D. 120.

(3) 31 Ch. D. 532, 538.

(4) Law Rep. 15 Eq. 266.

(5) 1 Cox, Eq. Cas. 315.

(6) Law Rep. 2 P. & M. 54.

(7) 18 Q. B. D. 588.

1888

HYDE

v.

HYDE.

of Court, but there there is an exceptional jurisdiction. *In re Spence* (1) shews the ground of it.

[FRY, L.J. Did not the Improvement of Jurisdiction of Equity Act (15 & 16 Vict. c. 86), s. 39, give power to summon persons in this way?]

In bankruptcy and winding-up special powers are given of summoning persons to give information, but s. 39 has never been applied except for the purpose of calling persons as witnesses to give evidence on an issue before the Court. Here there is no issue before the Court. The power of the Divorce Court over the children arises from the Divorce Act, 1857, s. 35, which does not make them wards of Court, so that the exceptional jurisdiction as to wards cannot be invoked. Butt, J., appears to have acted under Order XLII., r. 33, but this rule does not apply to the Divorce Court. The Judicature Act, 1873, s. 25, sub-s. 10, was relied on in argument, but it cannot be held to import into the practice of the Divorce Court a special power relating to wards of Court.

English Harrison, for the trustee of the settlement.

Inderwick, Q.C., and *R. H. Pritchard*, for the petitioner, were desired by the Court to confine themselves to the second and third questions.

It has been the practice in the Divorce Court to issue sequestration in a general form, leaving it afterwards to be determined what property the sequestrator can seize under it. That is the true view of *Miller v. Miller*. (2) The Judicature Rules of 1883 are not binding on the Divorce Court, so if it has been the practice of the Divorce Court to issue sequestration in a general form, *Scott v. Morley* (3) does not bear upon the case, and, indeed, as that was a judgment for damages given under the provisions of the Married Women's Property Act, 1882, it can have no bearing on sequestration.

As to the order for examination. Until the passing of the Divorce Act no Court but the Court of Chancery had any power to make provision for the maintenance and education of infants. The Divorce Act, 1857, s. 35, gives this power in wide terms to the Divorce Court.

(1) 2 Ph. 247, 252. (2) Law Rep. 2 P. & M. 54. (3) 20 Q. B. D. 120.

[COTTON, L.J. Does that give any power except as between the husband and wife?]

1888

 HYDE
 v.
 HYDE.

It is submitted that the words go further than that, and there was a reason for the reference at the end of the section to the Court of Chancery which has now ceased. The section applied only pendente lite, but by 22 & 23 Vict. c. 61, s. 4, the Court may act in the same way after final decree. Then s. 52 of the earlier Act provides that the decrees of the Court shall be enforced in the same way as decrees of the Court of Chancery, and the Court of Chancery could have examined any one in this way for the purpose of enforcing an order as to its wards. *Rosenberg v. Lindo* (1) is in favour of the order under appeal.

Cozens-Hardy, in reply. The jurisdiction under s. 35 is similar to that given by Serjeant Talfourd's Act, proceedings under which were never held to make infants wards of Court. *Rosenberg v. Lindo* (1) is inapplicable, it was an application in the action by which the children were made wards of Court. As to what the sequestrator may seize, *Birch v. Birch* (2) decides that what a person cannot alienate cannot be sequestered, and this decision was approved by the Court of Appeal in *Lucas v. Harris*. (3)

COTTON, L.J. This is an appeal against an order made by Butt, J., ordering a sequestration to issue against the respondent, and directing certain persons to attend to be examined.

As regards the sequestration, an objection was taken that there had been no personal service upon the respondent of the order for non-compliance with which the writ of sequestration was issued. It was contended that it was wrong to order sequestration to issue unless there had been personal service upon her of the order which she had disobeyed. In my opinion, under the circumstances, that objection cannot prevail. It is true that as a general rule no order will be made for sequestration or attachment unless it can be shewn that there has been personal service of the order disobeyed, but there are exceptions to that rule. If it were proved, for instance, that the person was actually in court at the time the order was made, service would be unnecessary in

(1) 48 L. T. 478.

(2) 8 P. D. 163.

(3) 18 Q. B. D. 127.

1888

HYDE

v.

HYDE.

Cotton, L.J.

order to obtain process for contempt, and personal service is also dispensed with if it is shewn that the reason why there has been no personal service is that the person to be served has evaded service.

Now, in this case has that been proved to the satisfaction of the Court? [The Lord Justice summed-up the evidence, and proceeded:—] In my opinion the proper conclusion of fact to be drawn from the evidence is that Mrs. Felgate was in communication with the respondent, and that the respondent, knowing of the order, was keeping out of the way in order to avoid service. In my opinion, therefore, the learned judge was justified in following the example which was set by Sir James Hannen in *Allen v. Allen* (1), where the Court arrived at the same conclusion—that the party was keeping out of the way in order to avoid service of the order.

Then an objection was taken to the general form of the order of sequestration. It was contended that in *Miller v. Miller* (2) the order of sequestration was only against the separate estate of a married woman as to which there was no restraint against anticipation; but we find from the minutes of the order (which have been obtained by the registrar) that that was not so, but that the order and the writ were in the same general form as in the present case, and we are told that the practice in the Divorce Court has always been to make the order and issue the writ in that form. Then, of course, there comes the question what money or property the sequestrator acting under such an order can seize. The question has been argued before us to a considerable extent, and therefore we think it right to express our opinion as to what can be sequestrated in the case of a married woman. I do not enter into the question what would have been done if there had been evidence before the Court that the wife had no property except separate property in respect of which she was restrained from anticipation, for that question does not arise, since the trustee informs us that there are arrears of separate income, the time for payment of which has arrived, and as to which, therefore, the restraint from anticipation is gone. As regards those arrears, it will be right for the sequestrator to apply for and obtain

(1) 10 P. D. 187.

(2) Law Rep. 2 P. & M. 54.

payment of them to him. It is said that there are mortgagees of the life estate. We cannot decide anything against them, as they are not here, but it is difficult to see how they can make any claim in respect of that income. With regard to future income it would in my opinion be wrong to hold that the sequestrator can enforce payment of it to him, because when a married woman who has separate estate, which is the mere creature of a Court of Equity, is restrained from anticipation, the Court in fact secures the property to her, and as she cannot do any act to anticipate the income or to give it to another person by anticipation, it would in my opinion be wrong for the Court to say, that because she has committed a contempt, the Court will not only authorize the sequestrator to receive the income already due to her, but will take advantage of her act to make an order for the sequestrator to receive the future income. That would be causing a married woman to do indirectly what she cannot do directly. In *Stanley v. Stanley* (1), even where a married woman had committed a fraud, it was held that the Court could not make an order overriding the restraint on anticipation. I think, therefore, that the sequestrator has no right to demand any separate income not already actually due at the time of the order, as regards which there is an effectual restraint from anticipation. When the divorce is made absolute the appellant becomes a feme sole, and the sequestrator will then be at liberty to require payment to him of any income becoming payable to her while she is a feme sole.

There is another part of this order which is important. Butt, J., has directed the mother, sister, and brother-in-law of the respondent to attend to be examined. I am not quite certain on what ground the learned judge put it. It rather looks as if he referred to Order XLII., r. 33, of the Rules of 1883. But the Rules of 1883 do not apply to proceedings in the Divorce Division, and that rule therefore cannot be relied upon. Nor do I see how the summoning these persons would serve the purpose of carrying into execution the order for delivery of the children. Then it was pressed upon us by the respondent that by the 52nd section of the Divorce Act, 1857, orders made by the Divorce Division are to be enforced in the same way as orders made by the Court of Chancery. I think

1888

HYDE

v.

HYDE.

Cotton, L.J.

1888

HYDE

v.

HYDE.

Cotton, L.J.

that means enforced in the mode adopted by the Court of Chancery when that differed from the mode adopted by the Common Law Courts. But what was the practice of the Court of Chancery? Undoubtedly the Court of Chancery, having power to protect its wards, did, either on the hearing of an application with reference to them, or when it was necessary to enforce orders relating to them, summon before it persons for the purpose of examining them, in order to obtain information to enable it better to protect its wards, but it did not do so in other cases. The argument is that by virtue of s. 52 any order of the Divorce Division can be enforced in the same way as any order of the Court of Chancery, and therefore in the same way as special orders of the Court of Chancery relating to its wards, as in *Rosenberg v. Lindo*. (1) But that is not so, the 35th section of the Divorce Act does not enable the Court by its order to make the infants wards of the Divorce Division, that section only enables the Court to make orders as between the parties, and the 52nd section, which only provides that orders of the Divorce Court shall be enforced in the same way as an order of the Court of Chancery, does not import, in the case of orders generally, a power confined to orders of a particular class, viz., those relating to wards of Court.

Then it was suggested that these persons might be called forward and examined with regard to an issue before the Court. In my opinion, that argument will not hold. There is no issue at all before the Court with reference to which these parties can attend as witnesses. An order was made by which it was directed that these children should be handed over to the husband. The Court has decided that the wife has been guilty of contempt in not obeying that order. The case, therefore, has been decided, and there is no issue at all before the Court with reference to which these persons can be summoned as witnesses.

In my opinion, therefore, that part of the order must be discharged.

BOWEN, L.J. I am of the same opinion. With regard to the point taken by the respondent that there was no service of this order, it seems to me that the conclusion from the facts before us

(1) 48 L. T. 478.

ought to be that she knew of the order perfectly well, and that, knowing perfectly well what the order of the Court was, she wilfully evaded service of it. I think, therefore, that it was right to issue sequestration.

1888

 HYDE
 v.
 HYDE.

Bowen, L.J.

Then we come to the second point in the case—the general form of the sequestration. I think that, as the Lord Justice has already said, the general form of sequestration has always been the one adopted in the Probate Division, and the registrar informs us that for thirty years, ever since the passing of the Divorce Act, this general form has been used. I incline to the opinion that the general form is the right one. There is great convenience in keeping to a general form, without attempting to define by negation all the property that is not to be seized, or to define categorically the property which can be seized. In *Miller v. Miller* (1), which was decided in 1870, an application was made for a writ of sequestration against the separate estate of the respondent. Lord Penzance states at the conclusion of his judgment that he shall direct a writ of sequestration to issue, but he goes on to say: “It may be necessary hereafter to decide what property is subject to the writ.” At the moment when that was read I did not feel quite sure what it meant, whether it meant that the question what property was subject to the order should be discussed before the writ issued, or that the writ should be issued in the general form, and the question discussed afterwards. We have had brought before us the writ that was issued in that case, and it was in the general form. The learned judge seems therefore to have deliberately decided in 1870 that the writ of sequestration should issue in the general form, and I see no reason for disturbing the practice.

Then comes the question what property is subject to it. I agree with the Lord Justice that it is right for us to express an opinion upon this question, that the effect of the general form may not be misunderstood. I agree that as regards future income it would not be right that a married woman's separate property which is subject to restraint from anticipation should be subject to sequestration. A case of *In re Glanvill* (2) is a decision of this Court upon the point. It seems to me that it would be doing

(1) Law Rep. 2 P. & M. 54.

(2) 31 Ch. D. 532.

1888

HYDE

v.

HYDE.

Bowen, L.J.

indirectly that which cannot be done directly, if the Court were to allow a married woman to cause to be anticipated by her own conduct income as to which she is restrained from anticipation.

Then comes the last point, upon which I think the respondent's contention must prevail. I do not think that the Order XLII., r. 33, upon the supposed strength of which this direction was given, that these persons not parties to the cause should attend and be examined, applies; for Order LXVIII., r. 1, states expressly that the General Rules of 1883 shall not affect proceedings for divorce or other matrimonial causes. Then is there any jurisdiction to make this order under the Divorce and Matrimonial Causes Act, 1857? The 52nd section of that Act says that decrees and orders made by the Court are to be enforced and put in execution "in the same or the like manner as the judgments, orders and decrees of the High Court of Chancery may be now enforced and put in execution." Now, was there in 1857 any possible mode of putting in execution a judgment of the High Court of Chancery by which you could examine orally persons who were not parties to the cause? There seems to have been no such mode of enforcing a Chancery decree in 1857 except in two possible contingencies. The first is the case of a ward of Court, and in that case the High Court of Chancery, it appears, did sometimes summon before it persons not parties to the suit with a view to better enforcing its own orders in respect of its wards. But the Divorce Division has no wards of Court, and therefore it is impossible to justify such a practice in the Divorce Court by citing the practice of the Court of Chancery in cases of wards of Court. Again, in 1857 the Court of Chancery might, for anything I know to the contrary, have compelled the attendance and directed the oral examination of witnesses when there was an issue to be decided in the particular case. But after an order has been made, as here, there can be no further issue to decide, and therefore to summon these persons would not be to summon them for the purpose of obtaining evidence upon an issue, but would be to exercise inquisitorial powers against them for the purpose of obtaining discovery in aid of execution. The Court of Chancery had no such power except in cases relating to its wards. Therefore, in my opinion, that portion of the order cannot be supported under s. 52.

FRY, L.J. Three points have been raised on behalf of the respondent in appealing against the judgment of the learned judge in the Court below. It is said that the order ought not to have been made, first, because there has been no personal service upon the respondent. I come to the contrary conclusion, because I think there is evidence on which we ought to conclude that she was keeping out of the way in order to avoid service of the order, and, therefore, that the Court had jurisdiction to pronounce the order for sequestration.

Then it was argued that the sequestration order ought to be confined in the same manner as the judgment in the case of *Scott v. Morley* (1). Now, in the first place, I may observe that the case of *Scott v. Morley* (1) has really nothing to do with a case of sequestration. That was a case of a judgment for damages, which can be obtained against a married woman only under the provisions of the Married Women's Property Act of 1882. That statute provides that damages claimed against a married woman can only be recovered against her separate estate, and another section, s. 19, provides that nothing in the Act shall interfere with any restriction against anticipation. But with regard to sequestration it appears to me that statute does nothing at all, and that, therefore, in the present case we are not confined by the particular language of that statute. Now I agree with what has been said by my learned Brethren with regard to the effect of a writ of sequestration upon the separate estate of married women. In my view it applies only to such separate property as is free from a restraint on alienation, but I do not think it was the practice either of the old Court of Chancery or of the Divorce Court, or of the Divisions which have followed those two Courts, to limit the writ of sequestration in anticipation of questions which may arise as to what property may come within its scope. I gather that according to the old practice of the Court of Chancery the writ ran in general terms, and the question might afterwards be raised what property did or did not fall within the operation of that writ. Thus in *Fenton v. Lowther* (2), the writ, as I gather, was in the general wide form, but nevertheless the Court declared that the half-pay salary or pension which was

1888

HYDE
v.
HYDE.

(1) 20 Q. B. D. 120.

(2) 1 Cox, 315.

1888

HYDE

v.

HYDE.

Fry, L.J.

paid to a person in his character of an equerry of the Duke of Gloucester did not come within the operation of the writ although conceived in general terms. And as far as I can see, in all the cases in which a discussion has arisen whether any particular property is liable to sequestration, it has arisen in that form: the discussion has not taken place upon the form in which the writ ought to be issued, but upon the question whether the writ conceived in general terms did or did not apply to the property in question.

Then comes the only other point. The learned judge in the Court below has ordered Mrs. Rowley, Mr. Felgate and Mrs. Felgate to attend for the purpose of being examined before the Court as to their knowledge of the whereabouts of the wife and of the children. I am unable to find any jurisdiction to make that portion of the order. In the first place it is contended that it is authorized by the 35th section of the Divorce and Matrimonial Causes Act of 1857. In my view that is a section which only enables the Court to make orders with regard to the custody, maintenance, and education of children as between the parties to the litigation, and I think that the section itself shews it was not intended by the legislature to clothe the Court of Probate with as wide a jurisdiction as the Court of Chancery had in respect of infants, because it enables the Court of Divorce and Matrimonial Causes, if it see fit, to direct proceedings to be taken for placing the children under the protection of the Court of Chancery. If there were any proceedings before the Court with regard to the making of an order as to the custody, maintenance, or education of the children pending the divorce proceedings it might well be that the Court had the power to summon witnesses before it. But that is not the case. The Court had made its order as to the custody of the children, and therefore I do not think that section gives any power to call strangers before the Court and examine them with regard to the whereabouts of the wife and the children.

But then it was said that the 52nd section of the Act authorized this order. That section provides that the decrees and orders of the Matrimonial Court shall be enforced and put in execution in the same or the like manner as judgments and

orders of the High Court of Chancery. Now I do not conceive that the Court of Chancery had any power to summon before it persons for the purpose of obtaining disclosure or discovery in aid of the execution of its orders. I am not speaking now of the power of the Court to summon persons to give information with regard to wards of Court, that is quite a different thing, but only so far as relates to discovery in aid of execution of orders of the Court. I am not aware of any such jurisdiction, and no case has been cited to us which supports the affirmative contention upon that point. But even if it were so, in the present case these persons are summoned not to enforce any order made by the Court, but to enable the Court to decide whether it shall make some other order. The Court has already made an order with regard to the custody of the children. It has been found that the respondent has contumaciously disobeyed that order. Nothing, therefore, was pending before the Court with regard to the execution of the order, and there was no aid required. Nothing was required in aid of execution of the order by the Court, so to speak, for the purpose of enforcing the order, but it was sought to have a further order made against the respondent for contumaciously not obeying the order. I think, therefore, even if there were jurisdiction in the Court to obtain discovery in aid of execution, there was no execution going on which required to be aided. In my opinion, therefore, that portion of the order is wrong.

1888

HYDE
v.
HYDE.

Fry, L.J.

Order varied.

Solicitors for petitioner: *Mann & Taylor.*

Solicitors for respondent: *Mear & Fowler.*

Solicitor for trustee: *Desborough.*

H. C. J.

1888

June 27, 28.

[IN THE COURT OF APPEAL.]

HARRISON v. HARRISON.

Divorce—Solicitor—Charging Order—Attorneys and Solicitors Act (23 & 24 Vict. c. 127), s. 28—“Property recovered or preserved”—Annual Sum secured to Wife under 20 & 21 Vict. c. 85, s. 32—Married Women’s Property Act (45 & 46 Vict. c. 75), s. 1, sub-s. 3.

A decree for dissolution of marriage having been made on the wife’s petition, an order was made under 20 & 21 Vict. c. 85, s. 32, directing her husband to secure to her for life the annual sum of 130*l*. Upon application by the solicitors who had acted for the wife under the petition for an order under 23 & 24 Vict. c. 127, s. 28, charging their costs upon such annual sum of 130*l*. :—

Held, that such annual sum was “property recovered or preserved by the solicitors,” and therefore liable to a charging order under s. 28; but the Court, reversing the decision of Butt, J., refused, in the exercise of its discretion, to make the order, on the ground that upon the facts it could not be presumed that the wife had entered into a contract with the solicitors so as to bind her separate property; that the husband was therefore *prima facie* responsible, and for anything that appeared the costs could be recovered from him.

IN this case there had been a decree for dissolution of marriage on the wife’s petition, and an order had been made under 20 & 21 Vict. c. 85, s. 32, for the husband to secure to the wife for her life the annual sum of 130*l*. The appeal was from an order of Butt, J., charging the costs of the wife’s solicitors on this annual sum of 130*l*.

It appeared that on May 11, 1886, the decree was made absolute. The parties were married before 1882.

On March 22, 1887, an order was made directing that the settlement made on the marriage of the parties be read as if the respondent were dead, and it was ordered “that the respondent do secure to the petitioner during her life the annual sum of 130*l*.”

The petitioner when she presented her petition was not entitled for her separate use to any property except that comprised in her marriage settlement, her interest under which was given to her “sole, separate, and inalienable use.”

Messrs. Walker, Sons & Rainer of Spilsby acted as the solicitors of the petitioner in the proceedings till May 17, 1888, when she gave them notice of change of solicitors. They thereupon

delivered their bill of costs, giving credit for all moneys paid by the husband on account of costs, and took out a summons for an order charging the amount on the 130*l.* per annum.

On June 5, 1888, Butt, J., made an order that the solicitors should have a charge upon the sum of 130*l.* payable under the order for permanent maintenance for their costs.

The petitioner appealed.

Byrne, Q.C., Deane, and Philpotts, for the petitioner. This annual sum is a mere allowance and not property which can be charged: *In re Robinson* (1); *Linton v. Linton* (2). *Bremner v. Bremner* (3) must be treated as overruled by *Cross v. Cross* (4) and *Leete v. Leete*. (5) The husband is responsible for these costs, and the solicitors can get them from him: *Ottaway v. Hamilton* (6); *Gill v. Gill*. (7)

Bayford, Q.C., and Barnard, for the solicitors. This is nothing but an annuity which the wife might settle on a second marriage, it is as much property as any other annuity is. It is not an allowance in the nature of alimony; it is given once for all under the 32nd section of the Act of 1857, and cannot afterwards be varied by the Court, it is not like an allowance under the Act of 1866 (29 & 30 Vict. c. 32). *Bremner v. Bremner* (3) decided that a solicitor had the ordinary solicitor's lien for costs on alimony which had come to his hands. In *Leete v. Leete* (5) and *Cross v. Cross* (4) he was held not to have any such lien, because the money had been improperly handed to him and was not legally in his hands. Those cases therefore leave *Bremner v. Bremner* (3) untouched. The wife had separate estate under her marriage settlement, and under the Married Women's Property Act, 1882, s. 1, sub-s. 3, her employment of the solicitors must be deemed to be a contract entered into with respect to her separate estate, and the husband is not liable: *In re Keane, Lumley v. Desborough*. (8) Unless, therefore, the solicitors obtain a charging order, they have no remedy.

(1) 27 Ch. D. 160.

(2) 15 Q. B. D. 239.

(3) Law Rep. 1 P. & D. 254.

(4) 43 L. T. 533.

(5) 27 W. R. 921; 48 L. J. (P. M. & A.) 61.

(6) 3 C. P. D. 393; 38 L. T. (N.S.) 925.

(7) 33 L. J. (P. M. & A.) 43.

(8) Law Rep. 12 Eq. 115.

1888

 HARRISON
 v.
 HARRISON.

Byrne, Q.C., in reply. This allowance is in the nature of alimony. In *Fisher v. Fisher* (1) the principles on which an allowance is to be made to the wife are fully discussed. The Court has a wide discretion, and gives an allowance with regard to the husband's means and to what will be a sufficient support for the wife.

[COTTON, L.J. How does that help us in determining whether the allowance when granted is "property" ?]

Then as to the liability of the husband, he is the person primarily liable, whether on the ground that the wife is to be considered his agent in retaining the solicitor, so as to make the retainer that of the husband, or on the ground that it is a contract for necessaries. It is a most unreasonable result that a bill for which the husband is primarily liable should be paid out of money which he is ordered to pay for the benefit of the wife. This ought to lead the Court to refuse to make a charging order, for the Court is not bound to make one in every case where it can be made, but has a discretion.

[COTTON, L.J. That point ought to have been taken earlier. We will, however, hear you upon it, but the respondents must also be heard.]

The solicitors contend that *Ottaway v. Hamilton* (2) is overriden by the Married Women's Property Act and that the husband is not liable. But the words in the marriage settlement operate as a restraint on anticipation as to all the separate estate the wife took under it: *D'Oechsner v. Scott* (3); and a married woman who has no separate estate free from restraint on anticipation cannot be taken to have contracted with respect to her separate estate. The husband is, therefore, liable for these costs, and the solicitors ought to exhaust their remedy against him before they attempt to attach the wife's annuity.

Barnard, for the solicitors. By the Married Women's Property Act, 1882, a contract by a married woman is to be deemed to be in respect of her separate property unless the contrary be shewn. Here she had separate estate, and in an action against the husband the solicitors would be met by the defence that this was a

(1) 31 L. J. (P. M. & A.) 1.

(2) 3 C. P. D. 393.

(3) 24 Beav. 239.

contract under which they were to look only to the separate estate. They ought not to be driven to bring a speculative action of that kind.

1888

HARRISON
v.
HARRISON.

COTTON, L.J. This is an appeal against an order of Butt, J., giving the solicitors who formerly acted for the wife as petitioner in a suit for divorce, a charge for costs upon a yearly sum of 130*l.* which after the dissolution of the marriage was secured to the wife by the husband under the order of the Court. It was argued at first only upon the ground that this 130*l.* a year was not property, and that, therefore, there was no power under the Attorneys and Solicitors Act (23 & 24 Vict. c. 127), s. 28, to make this charge upon it, as the Act only authorizes the Court to give a charge upon the property recovered or preserved. It was urged that this was only an order for alimony, and that alimony had been held by this Court not to be property, but merely an allowance, which the Court made, and could at any time withdraw. But this allowance was not made under any section giving the Court power to decree alimony, but under the Divorce and Matrimonial Causes Act, 1857, s. 32, which gives the Court power to secure a gross or annual sum to be paid to the divorced wife by the late husband. Of course the amount of such an annual sum is to be regulated by what is required for the maintenance of the wife, and by the amount of the husband's property. Therefore, in ascertaining the amount to be secured by the husband to the wife, the Court has regard to the same circumstances as it will have regard to when, before a decree or after an order for judicial separation, it has to grant alimony, but this sum which is secured by the husband under the order of the Court, is not, like alimony, capable of being withdrawn. It may if the Court thinks fit, be limited in such a way that it will come to an end in the same events in which alimony would be withdrawn by the Court, but that is quite a different thing. Alimony is withdrawn at the discretion of the Court, with regard to circumstances which may afterwards exist, but a provision made to the wife under s. 32 is secured to her as property, and it can only come to an end by virtue of the limitation under which it is given, not by virtue of any discretion exercised by the Court

1888
HARRISON
v.
HARRISON.
—
Cotton, L.J.

having regard to subsequent circumstances. So that in my opinion if the present case turned only on the question whether this annuity was property or not, I should be unable to differ from the order of Butt, J.

But then this point was taken—that it is not incumbent upon the Court to make an order giving a solicitor a charge for his costs—that the statute only gives the Court power to do so, and that under the circumstances of this case the Court having a discretion ought not to exercise that power. Now if the solicitor who has acted for the wife makes out a *prima facie* case that he will not otherwise get his costs, then in my opinion a charging order ought to be made. The operation of this section does not depend upon the fact of the person to whom the property belongs being liable for the costs, but there is a power to give a charge upon the property recovered or preserved in the action to reimburse the solicitor for having obtained that result, though the owners of that property are not personally liable to pay him, as we held in *Greer v. Young*. (1)

It was said for the solicitors, that having regard to the Married Women's Property Act they had no claim against the husband, because, having regard to that Act, the woman could contract with her solicitor, and that contract would bind her separate estate. But in order to raise that case on an application for a charging order, those who apply for the order ought, in my opinion, to shew that there was a contract between the woman and the solicitor having reference to her separate estate. First, I ask where is there any evidence that she had any separate estate with reference to which she could contract? When we look at her marriage settlement, under which she had the only separate estate to which she was entitled, we find that she had at the date of the marriage a reversionary interest in 5000*l.*, and also 1000*l.* to which she was then presently entitled, but the income of the 1000*l.* and of the reversionary interest when it falls into possession is to be held for her "sole, separate, and inalienable use." It is very true that she had separate property, but it was property with which she could in no way deal. Now under the Act of 1882 a contract is only presumed to be made with reference to the

(1) 24 Ch. D. 545.

separate estate unless the contrary shall appear, and it seems to me that in the present case the contrary does appear, for the fact of the separate estate being inalienable precludes the suggestion that the contract she made with the solicitors was made in respect to that separate estate. Therefore, in my opinion, the solicitors have not shewn anything to justify the Court in supporting the order made by Butt, J., for they have not made out any *primâ facie* case that if they do not get this charge they will not get their costs paid. In my opinion, therefore, the order was improperly made.

1888

HARRISON
v.
HARRISON.
Cotton, L.J.

BOWEN, L.J. I am of the same opinion.

With regard to the annual sum which was secured in virtue of the order of the Court to the wife, I agree with the view stated by the Lord Justice, that it is property. The sum in question is not alimony. The object is not to provide maintenance for the wife from time to time during the continuance of the matrimonial tie, nor is the allowance subject to variation at the discretion of the Court. It is an interest of a pecuniary kind created under s. 32 of the Matrimonial Act, 1857, and it appears to me that whether a gross sum or an annual sum is secured to the wife by virtue of the order of the Court under that section, it is property within the meaning of the Solicitors Act. The reason why I think it is property is, that it is not settled upon the wife so as to be inalienable, as if it were alimony, nor settled upon her in any such way as to shew that it would defeat the intention of the statute if she were to charge or alienate it. The fact that the sum may be a gross sum as well as an annual sum shews it not to be intended that the provision shall be inalienable, but that it shall become hers to all intents and purposes, subject of course to any restrictions which may be imposed upon it by the deed to be executed under the order of the Court, and approved by the Court. This annuity, therefore, is property.

But that does not settle the case. The Court is not bound to make a charging order under the Solicitors Act, and except in a case in which it thinks, not only that property has been preserved or recovered, but that the order is a just and proper one, it ought

1888

HARRISON
v.
HARRISON.

Bowen, L.J.

not to make it, and it seems to me that it would not be just or proper to make the order in a case like the present, unless the Court is satisfied that every means of obtaining payment of these costs from the husband has been exhausted. The husband is primarily liable unless there is something in the employment of the solicitor which leads to the inference that he was employed upon the terms that he was to look only to the separate estate of the wife. In this case, when we look at the marriage settlement, it is impossible to suppose that to be the true character of his employment, because the property given to the wife is given to her sole, separate, and inalienable use. I agree with the Lord Justice that these words restrain her from anticipation. I should be prepared so to hold if there were no authority on the subject, but there is ample authority for this view in the cases of *Steedman v. Poole* (1), *Spring v. Pride* (2), and other cases. I think, therefore, that this appeal must prevail on the ground that the solicitors asking for this charging order have not made out a *prima facie* case that such an order would be a just and reasonable one.

FRY, L.J. I am of the same opinion. The question which we have to consider is whether the learned judge has rightly exercised his discretion under the statute which enables him to create a charge in favour of the solicitor, and in this case we are not called upon merely to review that judicial discretion, but we are called upon to consider whether he rightly appreciated the legal position of the parties when he was exercising that discretion. Now I differ from him in his appreciation of the condition of the parties. It appears to me that we are bound to bear in mind that under the procedure in the Divorce Court there are four distinct sums of money which may be ordered to be paid, and which are very different the one from the other in some of their qualities. First there is the well-known alimony *lite pendente*. There is, secondly, alimony of a permanent character, which is directed to be paid upon a judicial separation being pronounced. Thirdly, there is the gross or annual sum which upon the dissolution of the marriage the Court is authorized by the Act of 1857, if it

(1) 6 Hare, 193.

(2) 10 Jur. (N.S.) 646, 647.

thinks fit, to direct to be paid by the husband to the wife, and, lastly, there are the monthly or weekly payments which under the Act of 1866 the Court may order upon a dissolution of the marriage, in the event of its not finding the husband to be capable of paying either the gross sum or the annual sum under the statute of 1857.

Now we have to deal with the case of a payment ordered under sect. 32 of the Act of 1857. That may be, as has been pointed out, either an annual sum or a sum in gross, and the Court may direct it to be secured by the deed of the husband or to be charged on property. It appears to me that such a sum is essentially different from alimony lite pendente, and from a sum payable under the statute of 1866, and I cannot regard it as being other than the permanent property of the wife.

I think, therefore, that this annual payment is property which in a proper case may be charged under the Attorneys and Solicitors Act.

But the next inquiry is this. Who was liable upon the solicitors' bill which by the order of Butt, J., was charged upon this annual sum? It is suggested that the wife is liable, and that is contended to be the result of the Married Women's Property Act, 1882, s. 1, sub-s. 3. "Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property unless the contrary be shewn." Now it is said that here the married woman had separate property. But it turns out that that separate property was inalienable. That, in my judgment, "shews the contrary" to the assumption that the contract was entered into by this married woman with respect to her separate property, for she cannot be deemed to have entered into a contract with respect to property which she could not alienate. We have, therefore, a case in which the husband is primarily liable, and the result of the order of the learned judge is to pay the husband's debt out of the sum which the husband is ordered to provide for the wife. That is a conclusion to which I should be unwilling to come, and I do not think that the sum which the husband is so directed to pay ought to be charged with his debts, at any rate until all reasonable recourse has been had to himself. Now no such

1888

HARRISON
v.
HARRISON.

Fry, L.J.

1888

HARRISON

v.

HARRISON.

Fry, L.J.

recourse has been had by the present respondents. They have not sued the husband, and they desire to avoid suing him. They ask us to infer that the debt is the wife's. Without prejudging any question that may arise in any litigation between the solicitors and the husband it appears to me that the debt is *primâ facie* the debt of the husband. The contrary has not been shewn to us, and therefore the applicants for this order have not made out such a case as it is incumbent upon them to make out before our discretion can be exercised in their favour.

Solicitors for the wife : *Mear & Fowler.*

Solicitors for the solicitors : *Hughes & Son.*

H. C. J.

July 17.

[DIVISIONAL COURT.]

THE ZEUS.

Ship—Demurrage—Admiralty Jurisdiction of County Court—32 & 33 Vict. c. 51, s. 2, sub-s. 1—“Agreement in relation to the use or hire of ship.”

By the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51), s. 2, county courts having Admiralty jurisdiction are empowered to try causes “as to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship,” provided the amount claimed does not exceed 300*l.*

By charterparty between the plaintiffs (shipowners) and charterers, it was agreed that the plaintiffs' ship should load a full and complete cargo of coals from such colliery as charterers might direct; the vessel to be loaded in forty-eight hours; the loading to be on conditions of colliery guarantee annexed thereto, which owner agrees to accept, and settle with the colliery agent for payment of any demurrage which may become due, and the ship if not despatched within the stipulated time to lay five days on demurrage at the rate of 16*s.* 8*d.* per hour. By the guarantee referred to, the defendants, a colliery company, undertook to load the ship in forty-eight hours and to be liable for the usual “demurrage for each hour exceeded.”

An action having been brought in a county court by the plaintiffs against the defendants for demurrage for not loading the ship within the stipulated time:—

Held, that the undertaking by the defendants to load the ship was not “an agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship,” within s. 2, and that the county court had no jurisdiction.

APPEAL from an order made by the judge of the County Court of Northumberland, holden at Newcastle, dismissing the action

on the ground that it was one over which the court had not jurisdiction.

1888

THE ZEUS.

The action was brought by the plaintiffs, the owners of the steamship *Zeus*, against the Ashington Coal Company and William Milburn & Co., to recover the sum of 54*l.* 3*s.* 4*d.* for sixty-five hours at 16*s.* 8*d.* per hour demurrage of the *Zeus* whilst loading a cargo of coals at Blyth.

Under a colliery guarantee made with the defendants William Milburn & Co., and dated August 19, 1887, the defendants, the Ashington Coal Company, undertook, subject to exceptions not material to the present case, "to load the *Zeus* with Bothal West Hartley best coals in forty-eight hours," and to be liable to usual "demurrage for each hour exceeded."

By a charterparty of the same date, made between the plaintiffs and the defendants, William Milburn & Co., it was mutually agreed that "the steamer . . . shall . . . proceed to Blyth and there load a full and complete cargo of Bothal coals from such colliery as charterers may direct . . . The vessel to be loaded in forty-eight hours . . . the loading to be on conditions of colliery guarantee herewith, which owner agrees to accept, and settle with the colliery agent for payment of any demurrage that may be due, . . . and if the steamer is not dispatched within the stipulated time she is to lay five days on demurrage at and after the rate of 16*s.* 8*d.* per hour."

On motion on behalf of the defendants, the Ashington Coal Company, the learned county court judge made an order dismissing the action as against them with costs "on the ground that the court was without jurisdiction, the loading undertaking, dated August 19, 1887, not being an agreement made in relation to the use or hire of a ship within the meaning of the County Courts Admiralty Jurisdiction Amendment Act, 1869, and the claim for demurrage of the steamship *Zeus*, sued for in this action, which, as against the defendants, the Ashington Coal Company, is founded on the said loading undertaking, not being, as against the defendants, the Ashington Coal Company, a "claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship."

The plaintiffs appealed.

1888

THE ZEUS.

Sims Williams, for the plaintiffs. This claim falls within the words "any claim arising out of any agreement made in relation to the use or hire of any ship" in 32 & 33 Vict. c. 51, s. 2. Demurrage is an agreed sum to be paid for the use or hire of a ship after the expiration of the lay days, and as the Ashington Coal Company were bound by their undertaking to pay this demurrage, the county court had Admiralty jurisdiction to try the case. The object of the statute being to enable the local court to settle on the spot disputes arising out of shipping matters, it should be liberally construed.

[He referred to *Gunnestad v. Price* (1) and *The Swan*. (2)]
Aspinall, for the defendants, was not called upon.

THE PRESIDENT. The question in this case arises out of an agreement to deliver on board a ship a certain quantity of coals, and we have to decide whether or not that agreement is one in relation to the use or hire of the ship. We should disturb the natural meaning of the words of the statute if we said that the agreement has relation to the use or hire of the ship. It is merely an engagement to deliver coals at a particular place. Reliance has been placed upon the fact that it provides for the payment of demurrage. But we must look at the facts, and remember that demurrage is a word of different meanings. It is a word, for instance, which is used not only in relation to carriage by ships but by railway trucks, and a charge is made for their detention under that name. What it seems to mean here is, that it is a penalty to be paid if the contract is not performed within a limited time. But unless it can be established that the agreement is one in relation to the use or hire of a ship the fact that the word "demurrage" is used is immaterial. I am of opinion that this appeal must be dismissed.

BUTT, J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Botterell & Roche*.

Solicitors for defendants: *T. Cooper & Co.*

(1) Law Rep. 10 Ex. 65.

(2) Law Rep. 3 Ad. & Ecc. 314.

E. S. R.

[IN THE COURT OF APPEAL.]

THE ARGENTINO.

1888

May 17, 29;

Aug. 9.

Collision—Damages—Agreement to provide Vessel for particular Voyage—Absence of definite Charterparty—Restitutio in integrum—Remoteness of Damage.

Previous to a collision between two vessels, the owners of one of them had made an oral arrangement with a firm of shipbrokers that the vessel upon the completion of the voyage upon which she was then engaged should go to Antwerp, and there load a cargo in turn as one of a line of steamers, and proceed by a particular route to the Black Sea. In consequence of repairs necessitated by the collision, the vessel was not ready to start for Antwerp so as to load in turn, and, by arrangement, another smaller vessel was substituted for the injured vessel, the latter vessel shortly afterwards taking the place of the substituted vessel on a less remunerative route.

In an action of damage the owners of the injured vessel sought to recover against the owners of the other colliding vessel a sum representing (1) the additional profit (calculated on the basis of the profits actually made by the substituted vessel) which would have been earned but for the substitution; (2) the loss of profit due to the difference in size of the two vessels; (3) the loss of time in loading the injured vessel for the substituted route:—

Held, by the majority of the Court of Appeal (Lindley and Bowen, L.JJ.), that evidence of the profits made by the substituted vessel was inadmissible, and that the damages must be assessed at such a sum as would represent what a vessel of the description of the injured vessel might ordinarily and fairly be expected to earn, having regard to the fact that a contract had been entered into for her profitable employment:

By Lord Esher, M.R., that damages in respect of the loss of the agreement for the future hiring of the vessel were too remote to be recovered.

APPEAL by plaintiffs, the owners of the *Gracie*, from a decision of the President of the Probate, Divorce, and Admiralty Division (1), referring back to the registrar of the Admiralty Division for re-consideration a report in which the registrar disallowed a claim by the defendants, the owners of the *Argentino*, for loss of profit caused by collision.

The following is a short summary of the facts, which are fully set out in the report of the case in the court below.

On February 20, 1887, a collision took place between the steamships *Gracie* and *Argentino*. Cross actions (subsequently consolidated) were brought by the owners of the respective vessels, but on an agreement being come to between the parties

1888

THE
ARGENTINO.

that both vessels were to blame, the amount of the damages was referred, in the usual way, to the registrar and merchants.

The claim sent in by the owners of the *Argentino* contained the following item of special damage:—

“ 16. Loss of profit on succeeding voyage, which £ s. d.
had been contracted for, but which defendants were unable to carry out, and for which another steamer was substituted, including eight days' time lost in loading cargo upon next voyage beyond the time which would have been consumed in loading the cargo originally contracted for . 785 16 5 ”

In support of this claim evidence was adduced of an oral arrangement made, about a week previous to the collision, between the owners of the *Argentino* and a firm of shipbrokers (Westcott & Laurence) for the *Argentino* to go to Antwerp, and there load and proceed by a particular route, known as the Batoum route, for the Black Sea, as one of Westcott & Laurence's steam line, but, in consequence of the collision, the repairs to the *Argentino* could not be completed in time, and another somewhat smaller vessel, the *Beta*, was substituted for the *Argentino*, the latter vessel shortly after proceeding by the route known as the Odessa route, which the *Beta* would have taken, and, as was alleged, thereby incurring delay and earning a smaller amount of freight.

The registrar disallowed the claim on the ground that the oral arrangement amounted to negotiation merely, and the damages sought were too remote; but on objection being taken to the registrar's report by the owners of the *Argentino*, the President of the Probate, Divorce, and Admiralty Division held, first, that the arrangement amounted to a binding contract, and, secondly, that the profits made by the *Beta* should be used as a basis to ascertain the difference between the advantage derived from the two voyages, so as to arrive at such damages as would represent (1) the additional profit which the *Argentino* would have made had she gone, as originally arranged, on the Batoum route; (2) the loss due to the difference in the size of the *Argentino* and the *Beta*; (3) demurrage for such number of days as was

reasonably lost by the *Beta* being loaded more expeditiously than the *Argentino*.

1888

 THE
ARGENTINO.

1888. May 17. *A. E. Nelson*, and *Meager*, (*Finlay*, Q.C., with them), for the appellants. The claim included under item No. 16 is inadmissible, for the oral arrangement entered into by the owners of the *Argentino* and Westcott & Laurence, with regard to the subsequent voyage, amounted to a negotiation only. Even assuming it to be a binding contract between the parties, it was in respect of freight to be earned on a subsequent voyage, and not upon that on which the ship was then engaged. The freight to be earned was therefore speculative, and too remote to be capable of being taken into account in the damages: *The Clarence*. (1) If the respondent's vessel had been sunk instead of being injured only, the appellants could not be called upon to pay such contingent profits: *The Columbus*. (2) A mere claim for consequential and probable advantage only will not be allowed: *The Betsey Caines*. (3) The case of *The Star of India* (4) is distinguishable, as there the voyage had begun in respect of which damages for loss of a charterparty were claimed, and a similar remark applies to *The Consett*. (5)

[LORD ESHER, M.R. The cases do not in terms shew the distinction you are contending for, viz. between a voyage begun and one not begun.]

No, but it follows from the common law rule as to remoteness of damage, and as it was laid down in *The Notting Hill* (6) that the rule as to remoteness of damage is the same in actions of contract or of tort, the common law cases in contract on this head, beginning with *Hadley v. Baxendale* (7), are available to support the present argument, and exclude damages of such an exceptional nature as those claimed. [They referred to *Jebsen v. East and West India Dock Co.* (8); *Horne v. Midland Ry. Co.* (9); *Sharp v. Powell* (10); *The Parana*. (11)]

(1) 3 W. Rob. 283.

(2) Ibid. 158.

(3) 2 Hagg. 28.

(4) 1 P. D. 466.

(5) 5 P. D. 229.

(6) 9 P. D. 105, at p. 114.

(7) 9 Ex. 341.

(8) Law Rep. 10 C. P. 300.

(9) Law Rep. 8 C. P. 131.

(10) Law Rep. 7 C. P. 253.

(11) 2 P. D. 113.

1888

THE
ARGENTINO.

1888. May 29. *Sir Walter Phillimore*, and *Boyd*, for the respondents. The agreement between the parties was that the owners of the *Argentino* undertook that that vessel should proceed to Antwerp, and be ready on or about the date advertised by Westcott & Laurence, to load there any cargo forwarded by shippers, and Westcott & Laurence undertook that the *Argentino* should have the next turn on the Batoum route. This undertaking constituted a binding contract from which neither party could withdraw. As to the second point—viz., that the owners of the wrongdoing ship are not liable to make good the loss arising under a contract relating to future earnings, and of which they had no notice, the rule in *Hadley v. Baxendale* (1) is not applicable to an action of tort like the present, and the wrongdoer must incur all the consequences of his wrong: *France v. Gaudet*. (2) The principle is stated in *The Clarence* (3), at p. 286, viz. that reasonable proof of an actual loss is sufficient, though in that case, as there was no contract for freight, the decision was against the claimants. In the case of *H.M.S. Inflexible* (4), compensation for the non-employment of the ship during repair was held part of the restitutio in integrum, and therefore the expense of detention and the amount of profit lost were allowed as consequential damage. The cases on fishing voyages support the view of the respondents: *The Gleaner* (5); *The Risoluto*. (6) The case of *The Yorkshireman*, in a note to *The Betsey Caines* (7), is in their favour, and similar principles have been applied by the Court of Chancery: *In re Trent and Humber Co., Ex parte Cambrian Steam Packet Co.* (8) The present is not a case of remoteness of damage, because that implies the intervention of some other cause. [They also cited *Bodley v. Reynolds* (9); *Wood v. Bell* (10); *The Gazelle* (11); Mayne on Damages, 4th ed., p. 44.]

Nelson, in reply.

Cur. adv. vult.

(1) 9 Ex. 341.

(2) Law Rep. 6 Q. B. 199.

(3) 3 W. Rob. 283.

(4) Swab. 200.

(5) 38 L. T. (N.S.) 650.

(6) 8 P. D. 109.

(7) 2 Hagg. 30, n.

(8) Law Rep. 4 Ch. 112.

(9) 8 Q. B. 779.

(10) 5 E. & B. 772, p. 789.

(11) 2 W. Rob. 279.

1888. Aug. 9. LORD ESHER, M.R. In this case the question is, whether certain damages ought to be allowed against the owners of the *Gracie*. It must be taken on the decision of facts by the President of the Admiralty Division that at the time of the collision caused, for the purpose of this inquiry, by the fault of the *Gracie*, the owners of the *Argentino* had an existing profitable contract with certain parties for the hire of their ship for a future voyage, and that by reason of the collision they lost the advantages of that contract. But it is also apparent that at the time of the collision the *Argentino* was not sailing under that contract at all; that the voyage on which she was sailing at the time of the collision was under a wholly different and independent contract. The question is, whether any loss in respect of the future contract can be allowed as damage consequent upon the collision. It is argued on behalf of the *Gracie* that such damage is too remote. It is argued on behalf of the *Argentino* that she is entitled to a *restitutio in integrum*. The first point raised is, whether there is or is not upon these propositions a different rule in the Admiralty from that in the Common Law Courts. The second point is, what is the true meaning of the phrase "*restitutio in integrum*." The third point is, what is the true definition of the phrase that the damages must not be too remote. The fourth question is, whether the damages under consideration are, or are not too remote. As to the first point, it would be deplorable if there were any difference, but I am of opinion that there is not. In the case of *The Gazelle* (1), Dr. Lushington, speaking of damages claimed under the rule of *restitutio in integrum*, says (2): "And if I find that in the Courts of Common Law the principle has been applied to any case *ex delicto* in the manner to which I have referred, it will be my duty to adopt and apply the same principle in this and future cases of the like kind, more especially as I do not find that in the practice of this Court there has been any such consistent and uniform course of practice as would militate against its introduction." And Dr. Lushington then examines and adopts a ruling of Cresswell, J., in the then Court of Common Pleas. And in the case of *The Columbus* (3) he

1888

THE
ARGENTINO.

(1) 2 W. Rob. 279.

(2) 2 W. Rob. p. 282.

(3) 3 W. Rob. 159, at p. 162.

1888

THE
ARGENTINO.

Lord Esher, M.R.

says, again treating of the rule as to damages: "And not only in this court, but *in all other courts*, the general rule of law is," &c.; "but although this is the general principle of law, *all Courts* have found it necessary to adopt certain rules for the application of it," &c.; and again, in the case of *H.M.S. Inflexible* (1), the same learned judge on the same matter says (2): "Such, I apprehend, are the general principles which a judge at *nisi prius* would lay down for the direction of a jury in a case in which it was their duty to assess the damage." As to the second point, it is often argued as if this rule and the rule as to remoteness were two co-ordinate and inconsistent rules, but in truth this is a rule subordinate to the rule as to remoteness. It is a rule as to the measure of a damage which is allowed; it does not deal with a damage which cannot be allowed. This rule does not come into play with regard to any claimed head of damage until it has been determined by the rule as to remoteness whether that head of damage can be brought into consideration at all. This is the true effect of what is laid down by Dr. Lushington in the *The Columbus* (3): "Under this assumption," he says, "what is the ground upon which he rests his claim for more than the full value of his vessel in the present instance? It has been argued on his behalf that the principle upon which the Court proceeds in all matters of this kind is a *restitutio in integrum*; in other words, *the principle of replacing the party who has received the damage in the same position in which he would have been provided the collision had not occurred.* As a general proposition, undoubtedly the principle in question is correctly stated, and not only in this court, but in all other courts, I apprehend, the general rule of law is, that where an injury is committed by one individual to another, the party receiving the injury is entitled to an *indemnity* for the same; but although this is the general principle of law, all Courts have found it necessary to adopt certain rules for the application of it, and it is utterly impossible in all the various cases that may arise that the remedy which the law may give should always be to the precise amount of the loss or injury sustained." Any one who considers the subsequent

(1) Swab. 200.

(2) Swab. p. 204.

(3) 3 W. Rob. 159, at p. 162.

part of that judgment will see that the certain rules to which Dr. Lushington refers include the rule as to remoteness of damage. The rule as to remoteness of damage does, no doubt, limit the literal application of the rule as to *restitutio in integrum*, yet in my view the two rules are independent, and the first matter for consideration in any particular case is, whether the damage claimed is or is not too remote. This brings me to the third question. As to this, it seems to me, as was said in *Hammond & Co. v. Bussey* (1), that it is useless to go further back than to *Hadley v. Baxendale* (2). That case states the rules which have been always since recognised as applicable both to cases of contract and tort. This is the view of the author of *Mayne on Damages*, and he deduces the rule as follows (3): "Having examined the principles by which the *assessment* of damages is governed, we have next to inquire what grounds of damage will in *no case* be admissible. These grounds may be classed under the general head of remoteness. Damage is said to be remote, when, although arising out of the cause of action, it does not so *immediately and necessarily flow from it*, as that the offending party can be made responsible for it." This rule is further explained thus (4): "The first and in fact the only inquiry in all these cases is, whether the damage complained of is the *natural and reasonable* result of the defendant's act: it *will assume this character if it can be shewn to be such a consequence as in the ordinary course of things* would flow from the act, or in cases of contract, if it appears to have been contemplated by both parties. Where neither of these elements exists, the damage is said to be too remote." In *Sedgwick on Damages* there are several phrases used to express the idea. In chapter ii. "the law refuses to take into consideration any damages *consequently or remotely* resulting from the act complained of." . . . "This general principle pervades the civil as well as the common law, and applies equally to cases of breach of contract and of violation of duty; to all cases, in short, where no complaint is made of any deliberate intention to injure." Citing a French commentator on the French code, he says: "The code does not require

1888

THE
ARGENTINO.
Lord Esher, M. R.

(1) 20 Q. B. D. 79.

(2) 9 Ex. 341.

(3) 4th Ed., p. 44.

(4) Page 45.

1888

THE
ARGENTINO.

Lord Esher, M.R.

that the non-performance of the contract should be the immediate and direct cause of the damage, but only that the damage should be the *immediate and direct* result of its violation, which is a very different thing." He afterwards approves of the definition of Mr. Greenleaf: "The damage to be recovered must always be the *natural and proximate* consequence of the act complained of." He afterwards points out that the damage relied on must be an *actual* damage, proved in the particular case. The damage relied on must therefore be an *actual* damage proved in the particular case. It must, besides that, be the *reasonable, natural, consequential result* of the act complained of; but even though it be in some sense all these, it must, moreover, be the *necessary, direct, immediate, proximate* result of the act complained of. A great many of these words seem to be almost, if not quite synonymous; "reasonable" and "natural" seem to be so; "immediate" and "proximate" seem to be so. The damage, then, must be an *actual* damage, proved to have occurred in the particular case. It must be the *reasonable and natural* result of the act complained of. If it can be shewn that the result which has occurred is *such as would be the consequence of the act in the ordinary course of things*, this requirement is satisfied. If the result is such as would not be the consequence of the act in the ordinary course of things, there must be some special circumstances which make it the reasonable and natural result in the particular case. If the result in the particular case fails to satisfy all these conditions, the case fails; the damage cannot be recovered. If the result satisfies these conditions, it must still further be the *direct and immediate* or *proximate* result of the act complained of. And it is not so if it is only brought to be the result of the act complained of by reason of some intermediate act or circumstance which might or might not have happened between the act complained of and the result relied on. The fourth question is, whether in this case the requisite conditions are satisfied. The act complained of is the wrongful collision. The result relied on is the failure of the agreement as to the future hire of the ship. Is the existence, during a voyage, of an agreement as to a future independent hiring of a ship, or an existing charter as to a future independent voyage, an ordinary occurrence in shipping

business? And more, is it an ordinary consequence of a damaging collision occurring on a voyage that an existing agreement or charter as to a future independent voyage should be frustrated? Neither proposition can be answered in the affirmative. Knowledge of business tells one so; but more conclusive, perhaps, is the fact that there is no trace of damage so resulting being allowed either in the Admiralty or at common law. There are no special circumstances as to this point in the present case. The claim in this case therefore fails to satisfy the necessary condition as to the result being an ordinary result, and cannot be allowed; and also the existence of the agreement as to the future voyage is a circumstance which might or might not happen as joining the damage relied on to the act complained of, so that the condition as to the damage being the direct and immediate result of the act complained of is not fulfilled. This decision does not conflict with the authorities which have allowed the loss of freight to be earned on the voyage on which the ship is at the time of the collision. A damage preventing the earning of such freight necessarily and in ordinary course leads directly to the result that such freight is lost. This decision, therefore, does not conflict with the decision in *The Star of India*. (1) In that case the *Cheviot* was heaving short to proceed on the chartered voyage, and the learned judge relied on that fact, reading (2) the evidence of the captain that "we were actually heaving short on board the *Cheviot* for the purpose of getting under weigh for the purpose of proceeding to the said port of Gopalpore." "So," says the learned judge, "the voyage may therefore be said to have begun." So in the case of *The Consett* (3), the ship was sailing on the chartered voyage. The case of *The Risoluto* (4) is really to the same effect, the ship there being injured whilst fishing. The cases of *The Parana* (5) and of *The Notting Hill* (6) are not to the exact point raised in the present case, though useful examples of the application of the rule as to remoteness of damages. I cannot gather that the point elaborately argued before us was presented in the same way to the President of the

1888

THE
ARGENTINO.

Lord Esher, M.R.

(1) 1 P. D. 466.

(2) Ibid. p. 470.

(3) 5 P. D. 229.

(4) 8 P. D. 109.

(5) 2 P. D. 118.

(6) 9 P. D. 105.

1888

THE
ARGENTINO.

Lord Esher, M.R.

Admiralty Division. The main points argued before him were on questions as to the facts on which we have adopted his decision. I am of opinion that the existence of a head of damage which is found to be too remote ought not to be regarded at all. It ought to be treated as not existing. I am of opinion that the appeal must be allowed, so far as the judgment of the learned President directs an inquiry as to any allowance in respect of the loss of the agreement for the future hiring of the vessel.

BOWEN, L.J. In the judgment which I am about to read Lindley, L.J., concurs. I regret not to be able to agree with the judgment of the Master of the Rolls, though I feel considerable diffidence in differing from any view of his. At the time of the collision in question the *Argentino*, according to the finding of the learned President (which I adopt), was under an engagement with Messrs. Westcott & Laurence, a firm of shipbrokers in London, to call at Antwerp to collect cargo for a Batoum route, and to take a turn for that purpose as one of a line of steamers actually advertised. In consequence of the collision she was necessarily put under repair, and was obliged to abandon her engagement,—the *Beta*, another vessel, belonging to other owners, taking her place and earning the profit for the trip she would have received. The learned President has held that the case must be referred to the registrar to ascertain the amount of loss which the owners of the *Argentino* have sustained by their vessel not being able to fulfil their contract, and has intimated that his calculation is to be made from the profit actually earned on the same voyage by the *Beta*, after allowing for the difference of capacity, &c., between the two vessels. The owners of the *Gracie* have appealed from the President's decision, and the question before us is as to the principle on which the damages for this collision should be assessed.

The damages recoverable from a wrongdoer in cases of collision at sea must be measured according to the ordinary principles of the common law. Courts of Admiralty have no power to give more, they ought not to award less. Speaking generally as to all wrongful acts whatever arising out of tort or breach of contract, the English law only adopts the principle of *restitutio in integrum*,

subject to the qualification or restriction that the damages must not be too remote, that they must be, in other words, such damages as flow directly and in the usual course of things from the wrongful act. To these the law superadds in the case of a breach of contract (or to speak according to the view taken by some jurists, the law includes under the head of these very damages, where the case is one of breach of contract) such damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of its breach. With this single modification or exception, which is one that applies only to cases of breach of contract, the English law only permits the recovery of such damages as are produced immediately and naturally by the act complained of.

A collision at sea caused by the negligence of an offending vessel is a mere tort, and we have only therefore to consider what has been in the particular case its direct and natural consequence. This consequence (in the case of an innocent ship which is disabled by an accident) is that its owner loses for a time the use which he otherwise would have had of his vessel. There is no difference in principle between such a loss and the loss which the owner of a serviceable threshing-machine suffers from an injury which incapacitates the machine, or the loss which a workman suffers who is prevented from earning money by the wrongful detention of plant which cannot at once be replaced. A ship is a thing by the use of which money may be ordinarily earned, and the only question in case of a collision seems to me to be, what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her. It is on this principle alone that it is habitual to allow in ordinary cases damages for the time during which the vessel is laid up under repair in addition to the cost of the repairs themselves. But this is merely an application of the general principle, and is not the measure in all cases of the loss. It might conceivably, upon the one hand, be the fact that the damaged ship would not and could not have earned anything at all while laid up for repairs, though such a case must necessarily be exceptional. In such

1888

 THE
ARGENTINO.

 Bowen, L.J.

1888

THE
ARGENTINO.

Bowen, L.J.

circumstances nothing ought to be allowed for demurrage. Upon the other hand the direct consequence of the accident might be that the injured vessel was necessarily thrown out of her employment, not merely during the period of repair, but for a longer period still. In such a case the loss could not properly be measured by the time taken in repairs alone.

The questions, therefore, to be inquired into are two: the first, to what extent, if any, the vessel has been thrown out of employment by the accident; the second, what would have been the fair earnings of a vessel such as the *Argentino* advertised to sail, as was the *Argentino*, on Messrs. Westcott & Laurence's line to Batoum, excluding, as I have said, everything in the nature of uncertain and speculative profits?

When a ship at the time of collision is under a charterparty that is lost in consequence of the collision, the existence of the charterparty is admissible and material to shew (what otherwise might have been a matter of doubt) that the ship has been thrown out of employment, but I cannot see that for the purpose of such proof the existence of an actual charterparty is essential, since other evidence may be equally cogent to establish the loss of employment. A whaling vessel which loses her season is thrown out of employment just as surely as if she had been a cargo-carrying vessel under a charter that has to be abandoned. In the present instance the *Argentino* was under an engagement to take her turn at Antwerp to collect cargo. The existence of such an engagement is evidence to shew that but for the accident she would not have remained idle but would have been employed, and she must be treated for the purposes of damages, in my opinion, as if she were a ship about to trade on Messrs. Westcott & Laurence's line and advertised to sail from Antwerp for that purpose, and the extent to which such profitable employment has been lost must be a question of fact to be decided by the tribunal whose duty it is to assess the damages.

It remains, however, still to be considered what is the value at which this loss of employment is to be calculated in the case of a vessel which, but for the accident, would have been serviceably used by her owner in a particular manner. This is a difficult matter to calculate, but the difficulty is only, after all, one of

fact. Where there is an actual charterparty such difficulty is reduced to a minimum. Where there is no charterparty but merely a reasonable certainty of employment, the matter is left more at large. Probably the most accurate mode of proof would be the opinion of persons acquainted with the trade and with the capacity and condition of the ship, who ought to be able to say what under the circumstances would be the ordinary earnings of such a vessel engaged to sail upon and about in a short time to sail upon such an adventure, as distinguished from all uncertain and all special profits which might or might not be reaped in a particular speculation. I do not think that the loss of such average and ordinary earnings in respect of a vessel which was advertised to sail, as the *Argentino* was, would be other than the direct and natural consequence of the collision. The question is not what would have been the damage that might have been anticipated in the case of other ordinary ships, but what was the direct and actual damage done in the case of the *Argentino*. We have not to consider, in other words, whether sea-going ships ordinarily have such engagements as the *Argentino* had at the time of the collision, but what was the direct and natural consequence of a collision to a ship which in fact enjoyed such prospects of employment.

The above reasoning appears to me to be correct on principle and conformable to authority. In *Heard v. Holman* (1) Erle, C.J., says (2): "Loss by collision is, amongst other things, loss of the freight which the ship would have earned if she had not been crippled by the collision." See also per Lord Cairns in the *Trent and Humber Co., Ex parte Cambrian Steamship Co.* (3); *Wilson v. General Iron Screw Colliery Co.* (4) It is, as it appears to me, on the above grounds, and no other, that loss of a beneficial charterparty has been allowed in the Admiralty Court: see *The Star of India* (5); *The Consett* (6). See also *The Steamboat Narragansett* (7) and *The Stromless*. (8) On these grounds loss of a fishing adventure was allowed in *The Risoluto*. (9) In the case of

1888

THE
ARGENTINO.

Bowen, L.J.

(1) 19 C. B. (N.S.) 1.

(2) Page 10.

(3) Law Rep. 4 Ch. 112.

(4) 47 L. J. (N.S.) Q. B. 239.

(5) 1 P. D. 466.

(6) 5 P. D. 229.

(7) Olcott's Ad. Rep. 388 (New York District Court).

(8) 1 Lowell, 153 (Massachusetts).

(9) 8 P. D. 109.

1888

THE
ARGENTINO.

Bowen, L.J.

The Clarence (1) Dr. Lushington says as follows: "It does not follow as a matter of *necessity* that anything is due for the detention of a vessel while under repair. Under some circumstances undoubtedly such a consequence will follow, as, for example, where a fishing voyage is lost or where the vessel would have been beneficially employed. Had the owners of the *Clarence* proved that the vessel would have earned freight, and that such freight was lost by the collision, the case would have fallen under the principle to which I have last adverted." So, in *The Black Prince* (2), the measure of the length of demurrage caused by a collision was held to be the length of time during which by reason of the collision the vessel had been thrown out of employment.

I agree, therefore, generally with the view taken by the learned President below, to the effect that the loss of the future adventure on which the *Argentino* was advertised to sail must be taken into account. The point at which I part from him is in that part of his judgment in which he considers that the profits earned by the *Beta* might be given in evidence as a mode of arriving (after due allowance for the differences of the two ships) at the value of the loss by the *Argentino* of her intended adventure. I cannot help thinking, with all deference to the judgment of so experienced a judge, that this evidence as to the profits of the *Beta* is strictly speaking inadmissible, though probably the difference between our two views is important in theory only. I do not think there is any authority for the reception of such evidence, and on principle I am of opinion it is not strictly receivable. What profit the *Beta* made is really *res inter alios acta*, and special instances of profits made by other ships cannot be given, I think, in examination in chief any more than in an inquiry into the value of land it would be permissible to offer in examination in chief special instances of the sale of other such land in the vicinity. I propose to vary the direction of the learned President in this respect only, and to direct that the matter go back to the registrar to allow such damages in respect of the collision as would represent the ordinary and fair earnings of such a ship as the *Argentino*, having regard to the fact that she was put up as one of Westcott & Laurence's line of steamers trading to the

(1) 3 W. Rob. 283.

(2) Lush. 563.

Black Sea, and advertised to sail as such. There ought to be no costs of this appeal. The costs of the reference and the costs in the Court below ought to be reserved and dealt with by the Court below.

1888

 THE
ARGENTINO.

Solicitors for appellants: *Lowless & Co.*

Solicitors for respondents: *Downing & Holman.*

E. S. R.

 THE CARGO *EX* ULYSSES.

June 7, 11, 25.

Salvage—Queen's Ship—Right to Reward.

A vessel with a valuable cargo on board, struck on a reef on an uninhabited island in the Red Sea near the mainland; and the crew began to jettison part of the cargo, which they threw into shallow water. Armed Arabs then crossed over from the mainland and began to plunder the jettisoned cargo. A Queen's ship having come up, her commander anchored near the wrecked vessel, and sent a number of his crew to act as sentinels on the beach of the mainland, who were posted for about a mile along the beach, and were exposed to severe heat. Others of the crew were employed in discharging the cargo, working up to their waists in water in the hold, which was greatly fouled. They threw out the cargo and hauled it across the reef to the mainland, where it was collected by the sentinels and labourers.

In an action of salvage by the commander and crew of the Queen's ship:—

Held, that the services rendered by them being beyond the scope of their public duty were salvage services, and that they were entitled to remuneration accordingly.

Two actions of salvage tried together.

For the purposes of the report it is only necessary to refer to the facts so far as they affect the claim in the first action.

In this first action the plaintiffs (by permission of the Lords Commissioners of the Admiralty) were Eustace Rooke, the commander, and the officers and crew of H.M.S. *Falcon*, and the claim was for services rendered to the cargo lately laden on board the steamship *Ulysses*. The defendants were (1) the owners of 260 bottles of quicksilver, no appearance being entered on behalf of the owners of any other part of the cargo, and (2) the Ocean Steamship Company, Limited, intervening.

The facts were shortly as follows:—On July 31, 1887, the *Ulysses*, an iron-screw steamship of 1300 tons net register, belonging to the Ocean Steamship Company, Limited, with engines

1888

THE
CARGO EX
ULYSSES.

of 225 horse-power nominal, a crew of forty-two hands all told, and a cargo of 2500 tons (machinery, scrap iron, quicksilver, and fine goods), of the value of about 60,000*l.*, left London for Algiers, Port Said, the Straits Settlements, and Chinese ports.

On August 17, about 3.35 A.M., the *Ulysses* ran on to a sunken coral reef on the north side of the Bluff Point on the island of Jubal Sereea in the Red Sea. She remained fast, in a dangerous position, with a list to port, and her head raised about twelve feet, whilst there was fifteen fathoms of water under her stern. Unsuccessful efforts were made by those on board the vessel to get her off, and the master then sent a message to Suez by a steamer, and commenced to jettison some of the ship's stores and cargo. The island where the *Ulysses* stranded is not inhabited, but on seeing a vessel in distress, a number of armed Arabs came over from the mainland and plundered the jettisoned cargo as it was washed ashore.

On August 19, in the forenoon, whilst H.M.S. *Falcon* was proceeding through the Straits of Ashrafi the *Ulysses* was observed. Commander Rooke thereupon kept the *Falcon* away for her, and having proceeded to her in his own boat, the master of the *Ulysses* requested him to stand by the ship and to render assistance in salving and guarding the cargo. For this purpose the *Falcon* was anchored, under banked fires, to the southward of Bluff Point, and the senior lieutenant with twenty-four hands was sent on board the *Ulysses*, whilst forty hands under their officers were landed and posted as sentries guarding the jettisoned cargo, which was scattered for more than a mile along the beach. The weather at the time was very hot, and the sentries were exposed to the heat.

On the same day the company's agent arrived from Suez, and, with the aid of labourers he brought with him and the working party of H.M.S. *Falcon*, cargo was discharged into two lighters which he had had towed down from Suez.

On August 20 the wind blew fresh from N.N.W., raising a sea which caused the lighters, half-laden on the weather side of the *Ulysses*, to strike her heavily. The *Falcon* thereupon weighed anchor and towed the lighters clear of the *Ulysses*.

On August 21 the steamship *Orestes*, belonging to the same

company, arrived with another lighter and two powerful pumps, which were rigged on board the *Ulysses*, but failed to make any impression on the water in the forehold. On the 24th, the *Falcon* was engaged during a great part of the day assisting the *Orestes* in trying to tow the *Ulysses* off, but as their combined efforts were unsuccessful, two wooden water-tight bulkheads were commenced to be built in the forehold on each side of the leak.

1888

THE
CARGO EX
ULYSSES.

On August 26 the *Orestes* left, being replaced by the screw-steamship *Glaucus*, belonging to the same company, and up to August 30 the party from H.M.S. *Falcon* remained on board the *Ulysses*, some of them working up to their waists in water in the forehold, and in addition to suffering much from the fouling of the water by a portion of the submerged cargo, a good deal of their clothing was destroyed. With the assistance of this party, the cargo was discharged, whenever the weather permitted, into the lighters, and at other times, as the vessel strained heavily, and there was risk of her going to pieces, the cargo was thrown overboard, and then hauled with some difficulty over the coral reef, when it was collected and put into boats by the labourers and the party from the *Falcon*, who remained protecting the operations and assisting on shore until that vessel left. Further difficulty was experienced during part of the time owing to some of the crew of the *Ulysses* becoming unmanageable through broaching liquor which formed part of the cargo.

On September 6 the *Falcon* left with about 170 tons of cargo, which she landed on September 8 at Suez. The remainder of the cargo which the crew of the *Falcon* had helped to work out of the *Ulysses* was carried to Suez by Maltese sailing-boats hired by the Ocean Steamship Company, and further salvage operations were continued by various other vessels.

There was a conflict of evidence as to whether any of this quicksilver was saved by the men of the *Falcon*.

Sir W. Phillimore, Nelson, and Seth Smith, for the captain and crew of the *Falcon*. The plaintiffs are entitled to salvage, for they have done more than was required by their public duty: *The Rosalie* (1); *The Dalhousie*. (2)

1888

 THE
CARGO EX
ULYSSES.

Kennedy, Q.C., and *Pickford*, for defendants in first action. The plaintiffs are not entitled to salvage. Officers and men of Her Majesty's Service are not entitled to salvage for such work as was done in this case: *The Francis and Eliza*. (1)

Myburgh, Q.C., and *Raikes*, for defendants, the owners of quick-silver laden on the *Ulysses*, argued on the same side.

Sir W. Phillimore, in reply.

THE PRESIDENT [after stating the facts, and after observations on various parts of the claim, proceeded in respect of the claim by the captain and crew of H.M.S. *Falcon* as follows:—] A claim is put forward by the captain and crew of H.M.S. *Falcon*, by permission of the Lords Commissioners of the Admiralty.

It is to be observed that it is not a claim by the Admiralty, which would involve a claim, if ever such a claim is made, for the use of the ship, but it is exclusively a claim by the captain and the crew. They are not entitled to bring into consideration the value of the *Falcon*, as is done usually; that affects the owners, the State, and no claim is made on behalf of the State.

Then arises the question, in what way the services of the captain and crew are to be estimated?

It appears to me that there is a certain amount of protection, which is so plainly within the ordinary duty of Her Majesty's ships, that it would not give rise to any claim for salvage, and I do not think that the Admiralty would sanction any claim which was based simply upon the protection which is afforded by the presence of one of Her Majesty's ships against pirates or land robbers. But the case is altered when the officers and crew of one of Her Majesty's vessels are called upon to do something which is not within the ordinary scope of the duties they are supposed to perform; and that applies to the planting of sentinels on this island for the purpose of protecting the cargo, exposed under very peculiar circumstances to the heat in this place.

But that would not, in my judgment, give rise to a high standard of reward; the men would have to be rewarded in the spirit in which a generous master gives a gratuity to his

servants who have been called upon to do something lying a little outside the scope of their ordinary functions.

But then we proceed to another class of services, which undoubtedly appear to me to be entitled to a higher rate of reward. I allude to the services of the crew of the *Falcon* in getting out this cargo under these particularly unfavourable circumstances, and also in rescuing the cargo from the shallow water in which it was, in the first instance, thrown, and transporting it over this neck of land. All that work appears to me to be entirely out of the scope of the duties of crews of Her Majesty's ships, and entitles those engaged in it to a substantial award. But they are not entitled to anything for that which enters largely into the claim put forward by the Ocean Company, namely, for the carriage from the reefs to Suez, because that of course is a service by the ship.

With these general observations I proceed to say what I have arrived at as a fair remuneration. I come to the conclusion that 1000*l.* is a proper reward for the captain and crew of the *Falcon*.

Upon the subject of the quicksilver, I think it right to dispose of one point which was touched upon in the course of the inquiry, and that is, the extent to which services were rendered by the *Falcon* to the quicksilver. I am quite satisfied in my own mind that those witnesses who gave some evidence upon the subject were mistaken and that they never handled the quicksilver at all.

I accept the evidence which was given that the quicksilver, lying low in the cargo, was not disturbed at all until after the *Falcon* had ceased to work, and therefore the claim of the *Falcon* as against the quicksilver would be confined to that general protection which, I think, was given throughout the whole of the operations. Whether the quicksilver had any special attraction for the Arabs I do not know, but, at any rate, it was probably saved from being incapable of being recovered.

But it is not necessary for me at this stage to distinguish the amount which ought to be assessed on the quicksilver for this general protection. When I deal ultimately with the claim of the Ocean Company as against the quicksilver and the rest of the cargo I will then say what portion of the amount I have

1888

THE
CARGO EX
ULYSSES.

Sir J. Hannen.

1888
THE
CARGO EX
ULYSSES.

awarded to the *Falcon* should be assessed on the quicksilver. The plaintiffs in the first action will, of course, have their costs generally.

[The case being settled subsequently to this judgment, no further judgment was delivered.]

Solicitors for the plaintiffs: *Lowless & Co.*

Solicitors for the interveners: *Pritchard & Sons, for Thorneley & Cameron, Liverpool.*

Solicitors for the defendants, owners of quicksilver: *Waltons, Bubb, & Johnson.*

E. S. R.

June 14;
Aug. 7.

ALDRIDGE v. ALDRIDGE (OTHERWISE MORTON).

Nullity—Agreement not to sue—Consideration—Bar.

In a petition by husband against wife praying that the marriage celebrated between them might be declared null and void on the ground of her incapacity, the respondent pleaded that she and the petitioner after a year's cohabitation had agreed to live apart, and had bound themselves not to make any claim against each other either in a court of law or equity; and that if either party should break the agreement the other should be entitled to an injunction to restrain such breach. That it was further agreed that if the respondent committed a breach of the agreement the petitioner should be entitled to proceed in this Court for a declaration of nullity. Averment—that there had been no breach of the agreement on the part of the respondent:—

Held, that the respondent's agreement not to sue was a sufficient consideration for the husband's engagement to do the like, and that such an agreement although not by deed was therefore a bar to a petition for declaration of nullity.

THIS was a petition by James Henry Aldridge praying for a declaration of nullity of his marriage with Julia Aldridge, otherwise Julia Morton. In his petition the petitioner stated that the ceremony of marriage according to the rites of the Church of England was on January 9, 1884, duly solemnized at St. John's Church, in the parish of Cleckheaton, in the county of York; that the petitioner and respondent lived and cohabited together for the space of one year and one month, and that the marriage had never been consummated by reason of the malformation of the respondent.

The respondent in her answer denied the incapacity, and the

non-consummation, and in the third paragraph she pleaded that on March 16, 1885, the following agreement had been made between the petitioner and herself:—

1888

ALDRIDGE

v.

ALDRIDGE.

“Whereas very great differences have arisen between the said parties, and whereas there is one particular difference between them which if brought into court by suit would render the marriage of the parties hereto null and void ab initio: And whereas both parties hereto are desirous that no further unpleasantness should arise between them on the said grounds of difference, and both are wishful to enter into the following agreement perfectly voluntarily: And whereas the said parties hereto are now living separate and apart from each other: Now it is hereby agreed by and between the said parties hereto and each of them that they and each of them shall for the future live and reside separate and apart from each other, and that for the future neither of them shall make any claim against each other for any reason, purpose, or cause whatsoever either at law or in equity, nor any otherwise howsoever, nor trouble nor molest each other, nor in any way whatever interfere with each other, nor cause nor procure any person or persons to claim or make any claim as aforesaid, or to molest, trouble or interfere between each of them in any way whatever either at law or in equity or in any court of any jurisdiction, or otherwise howsoever: And in case either party hereto shall break, violate, or in any way fail to carry out this agreement in its integrity, or claim, molest, trouble, or interfere as aforesaid, or cause or procure the same to be done, then and in such case the party hereto claiming, troubling, molesting, or interfering as aforesaid with the other of them as aforesaid shall be liable to and shall forfeit and pay to the other of them the penalty and full sum of two hundred pounds sterling, with full power and authority to sue for, recover and receive the same in any court of competent jurisdiction as and for liquidated damages, and shall also be at liberty to seek for in any such Court, and to move for and to be entitled to an injunction to restrain such claiming, troubling, molesting, or interfering as aforesaid: And it is further agreed that in case the said Julia Aldridge be or become, or procure or cause to be or become, or others on her behalf shall be or become the claiming, troubling,

1888

ALDRIDGE
v.
ALDRIDGE.

molesting, or interfering party or parties, that then and in such case the said James Henry Aldridge, in addition to all the powers and remedies given to him by this agreement for the recovery of damages as aforesaid, and an injunction as aforesaid, shall be and he is hereby enabled and allowed to proceed in the Divorce Court for a decree for nullity of the said marriage and for divorce, and for other relief as he may be advised and which he may deem requisite: And that this agreement shall not bar his claim for such proceedings for and for such decree for nullity of marriage and divorce as aforesaid, nor from proceedings for divorce by reason of the said Julia Aldridge's desertion or otherwise, and that the time occurring under and by virtue of this agreement, and happening under it, shall not count to preclude him from such relief as aforesaid, and that he may proceed therefor as if this agreement had never been made or entered into and as if the said parties hereto had never lived separate and apart under this or any other agreement whatsoever, either verbal or written."

She further pleaded that all things were done and happened necessary to entitle her to have the said agreement performed by the petitioner, and that she, the respondent, did not commit any breach of the said agreement, yet the petitioner in breach of his said agreement not to make any claim against the respondent for any reason, purpose, or cause whatsoever presented his petition in this suit.

This respondent therefore claimed:—

1. A declaration that the petitioner was not entitled to proceed with his said petition.
2. An order staying all further proceedings upon the said petition.

The petitioner in his reply submitted that the agreement was not binding and conclusive against his right to have the relief sought and prayed for by his petition, and that he was entitled to such relief notwithstanding the said agreement.

An order was made that the question of law raised by the third paragraph of the respondent's answer should be set down and tried before the other matters in dispute, and on June 14 this question came on for argument before the President.

Dr. Tristram, Q.C., (Searle, and R. H. Pritchard, with him), for the petitioner.

1888

ALDRIDGE

v.

ALDRIDGE.

Bayford, Q.C., (Middleton, with him), for the respondent.

In the course of the argument on both sides the following cases were referred to: *Marshall v. Marshall* (1); *Wilson v. Wilson* (2); *Westby v. Westby* (3); *Rowley v. Rowley* (4); *McGregor v. McGregor* (5); *Gibbs v. Harding* (6); *Besant v. Wood* (7); *Palliser v. Gurney* (8); *Clark v. Clark* (9); *Hunt v. Hunt* (10); Kay and Elphinstone's Compendium of Precedents, p. 414.

Cur. adv. vult.

THE PRESIDENT. This is a petition by husband against wife praying that the marriage celebrated between them on January 9, 1884, may be declared null and void on the ground of the wife's alleged incurable malformation.

The respondent pleaded that by an agreement of March 16, 1885, between the petitioner and herself, it was agreed between them that for the future they should live separate and apart from each other, and that neither of them should make any claim against the other for any reason, purpose, or cause whatsoever, either at law or in equity, nor trouble nor molest the other, nor interfere with the other in any court of any jurisdiction, and in case either party should break or violate the said agreement the other party should be entitled to an injunction to restrain such proceeding. And it was further agreed that in case the respondent should commit a breach of the said agreement the petitioner should be allowed to proceed in the Divorce Court for a decree of nullity, and the respondent further alleged that all things were done to entitle her to have the said agreement performed by the petitioner, and that she did not commit any breach of the said agreement, yet the petitioner in breach of his agreement not to make any claim against the respondent for any reason, purpose, or cause whatsoever has presented this petition.

(1) 5 P. D. 19.

(2) 1 H. L. C. 538.

(3) 2 Dr. & W. 502.

(4) Law Rep. 1 H. L., Sc. 63.

(5) 20 Q. B. D. 529.

(6) Law Rep. 5 Ch. 336.

(7) 12 Ch. D. 605.

(8) 19 Q. B. D. 519.

(9) 10 P. D. 188.

(10) 4 D. F. & J. 221.

1888

ALDRIDGE

v.

ALDRIDGE.

Sir J. Hannen.

The petitioner replied that the said agreement is not binding and conclusive against his right to have the relief sought, and that he is entitled to such relief notwithstanding the said agreement.

It was admitted by the petitioner's counsel that it cannot now be contended that an agreement between husband and wife not to prosecute a suit for nullity is contrary to public policy. It was decided by the House of Lords in *Wilson v. Wilson* (1) that the stopping such a suit is a sufficient consideration for articles of separation.

In *Rowley v. Rowley* (2), where a suit for divorce was compromised, it was held in the House of Lords that an agreement by the wife not to institute other proceedings in the Divorce Court was binding on her.

In *Marshall v. Marshall* (3) I came to the conclusion that a Court of Equity would enforce by injunction restraining its breach a covenant either by husband or wife not to sue for restitution of conjugal rights, and I can see no valid distinction between such a covenant and one not to sue for a decree of nullity.

But it was contended for the petitioner that in the present case there was no consideration for the husband's promise, this agreement not having been made by way of compromise of any existing suit. This objection was fully considered by the late Master of the Rolls in *Besant v. Wood* (4). He says (5): "If a married woman can compromise a suit after she commences it, why not then when she threatens it or before she begins it? If after instituting a suit for divorce, or having a suit for divorce instituted against her, and she defending it, she can compromise by agreeing to live separate on terms as regards maintenance of herself, custody of children, and so forth, why not before? Why not after the quarrel and before the litigation commenced? The very same reasons appear to me to apply to one case as to the other. If the wife has a right to sue for restitution of conjugal rights, for separation, or for divorce—if she has a right after beginning a suit to compromise a suit she ought to have a right

(1) 1 H. L. C. 538.

(3) 5 P. D. 19.

(2) Law Rep. 1 H. L., Sc. 63.

(4) 12 Ch. D. 605.

(5) At p. 622.

to do so before, and if she has the right afterwards in the sense of being bound by her agreement, why should she not have the same right before as regards those matters as to which she has a clear right to institute the suit, those matters being matters of personal status, and the question that of living together or not. It seems to me to follow as a necessary corollary to the right to sue by herself that she must have the right to contract not to sue, and I should think there would be no difficulty at all about it."

I entirely adopt this reasoning, and it follows that if the wife can bind herself not to sue her husband in a matrimonial suit, her agreement not to do so is a good consideration for the husband on the other hand agreeing not to sue her.

It was further contended that an agreement of this kind is invalid unless by deed. I can find no authority for this contention. On the contrary, the authorities are against it. In *Rowley v. Rowley* (1) there was no deed. In *Macgregor v. Macgregor* (2) a Divisional Court held that a verbal agreement to live separate was valid and enforceable against either party. Lastly, it was contended that the agreement amounted to an admission on the part of the wife that the marriage was invalid, and therefore that she had nothing to give in consideration for her husband's agreement not to sue for a decree of nullity. But the agreement contains no such admission, and the respondent denies her incapability. In suits of this kind it is a common occurrence that each party asserts that the fault lies with the other, and there is frequently a bonâ fide doubt which of them is to blame. Both parties therefore may well desire not to have such a painful subject discussed in court, and the agreement of the one to abstain from such a litigation is a good consideration for the other agreeing to do the like.

I am therefore of opinion that the answer discloses a good defence, and I dismiss the suit with costs.

Solicitors for petitioner: *H. B. Clarke & Sons, for Gordon, Hunter & Macmaster, Bradford.*

Solicitors for respondent: *Bell, Brodrick & Co.*

(1) Law Rep. 1 H. L., Sc. 63.

(2) 20 Q. P. D. 529.

1888

ALDRIDGE
v.
ALDRIDGE.
—
Sir J. Hannen.

1888
July 20.

GARCIA v. GARCIA.

Divorce—Desertion.

At the trial of a petition by the wife for divorce from her husband on the ground of adultery and desertion it appeared that they were married in 1866, and that after four years' cohabitation it was agreed between them, on the husband falling into difficulties, that a house and shop should be taken for the wife, and that she should carry on business in a separate name. From this time the parties had never lived together, though the husband occasionally visited his wife and slept with her, and he made her an allowance. His visits were always as far as possible made in secret, and though his wife remonstrated he refused to recommence open and avowed cohabitation. In 1885 the wife had reason to suspect that her husband was carrying on adulterous intercourse, and she never afterwards cohabited with him. In 1888 she obtained positive proof of his adultery, and thereupon commenced the present suit:—

Held, that in the circumstances there was sufficient evidence of desertion for two years without reasonable cause by the husband.

THIS was a petition by the wife for the dissolution of marriage on the ground of her husband's adultery and desertion. The adultery was not denied, and the only question was whether there had been desertion for two years without reasonable cause.

The case was heard before Butt, J., without a jury.

The parties were married in 1866 in Devonshire, and cohabited together in London and afterwards in Manchester. There was one child of the marriage, a daughter, born in 1866. In 1870 the respondent became involved in financial difficulties, and it was agreed that, a house and shop should be taken for the petitioner, and that in order to protect the business against any possible claims on behalf of the husband's creditors, it should be carried on in the name of Harding. From that time the husband and wife had never lived together though he occasionally visited her, and on some occasions slept with her. In 1883 the petitioner removed to London, where she and her daughter continued to pass under the name of Harding, and were visited at intervals by the respondent. Both in Manchester and London he always took precautions to conceal his visits, entering and leaving by the back door, and he always refused to cohabit openly with the petitioner, although both she and her daughter had remonstrated against the manner of his visits. From the time of the separation

he allowed his wife 2*l.* 10*s.* a week, and occasionally made her presents of other moneys.

About August, 1885, she began to entertain suspicions that her husband was living with another woman in Manchester, when she removed to lodgings where there was only one bedroom, and from September, 1885, no intercourse had taken place between them. In February, 1888, it came to the petitioner's knowledge that her husband had been living in adultery with a woman in Manchester since 1882. The husband admitted this in a letter to his wife, whereupon she instituted the present suit. The other facts will be found stated in the judgment.

Bayford, Q.C., for the respondent, submitted that there was no desertion for the required period, as the cessation of cohabitation was due to the refusal of the wife to continue cohabitation, and referred to *Fitzgerald v. Fitzgerald*. (1)

Inderwick (Searle with him), for the petitioner, contended that the desertion commenced from the time when the wife had reason to believe that her husband was living in adultery.

BUTT, J. In this case it is proved, and, in fact, not denied, that the husband has been living in adultery with another woman for several years. The serious question in the case arises on the charge of desertion, the wife not being entitled to her decree for divorce unless there has been desertion for two years and upwards, as well as adultery. The facts with regard to that matter of desertion are somewhat curious. These persons were married as long ago as the year 1866, and after some years of apparently happy married life, the husband got into difficulties and became bankrupt. A house, and, I think, a business, was procured for the wife, in Manchester, and it naturally occurred to Mr. Garcia that if it were taken in his name, and the furniture and stock-in-trade were found in the house, and the business were carried on by his wife in her own name, there might be danger of his assignees in bankruptcy stepping in, and therefore, it was, that, for the protection of the property, he suggested that his wife should live under an assumed name. She assented to the proposition, the name of Harding was adopted, and it appears that

1888

 GARCIA
v.
 GARCIA.

1888

GARCIA
v.
GARCIA.
Butt, J.

from that time down to a very recent period Mrs. Garcia and the only child of the marriage lived as Mrs. and Miss Harding. It is due to the respondent to say, that he appears during the whole period to have made an allowance for the maintenance of his wife and child; I daresay such allowance as his income enabled him to make. But his relations to that household were strange in the extreme. Both while they remained in Manchester, and after they removed to London and its neighbourhood, he only visited them occasionally, and then he generally came in by the back door; he did not like to be seen going in and out of his wife's house, and the daughter has said that he used sometimes to write to her and ask that the back door might be left unfastened, so that he need not have to go to the front door. It is an odd way of cohabiting, but still he appears to have slept in the house occasionally down to some time in the year 1885. The wife has sworn that she was actually turned out of the first lodging she stayed at in London, because the landlord was indignant at her receiving visits from a man. The meaning of that is that unhappiness was brought upon her by the fact that Mr. Garcia did not choose to appear as her husband, and that rather than do so he was willing, as he said, that people should draw their own conclusions. Some time in the year 1885, the wife began to suspect, if she was not convinced, that he was living with another woman, and then there came about an alteration of relations. She took a house in which she had no sleeping accommodation except the room occupied by herself and her daughter, and from that time there never has been conjugal intercourse between these married people. Now it is said that this state of things does not constitute desertion, at any rate for two years, as required by the statute, and the case of *Fitzgerald v. Fitzgerald* (1) has been referred to, in which a wife having reason to believe that her husband had been guilty of adultery, separated from him, and instituted a suit for divorce. They never afterwards resumed cohabitation, and neither of them took any steps to bring about a reconciliation. It was pointed out that there the wife had separated herself from the husband because she suspected he had been guilty of adultery, and it was under those circumstances that the

(1) Law Rep. 1 P. & M. 694.

Court held there was no desertion. But there is another case, *Farmer v. Farmer* (1), which to my mind is conclusive on the matter. Dealing with the allegation that there had not been desertion for two years, inasmuch as a child had been born within the two years, the President said he should be disposed to hold that desertion commenced about a month before the birth of the child, and he added: "I have on other occasions pointed out that if a man is living with another woman, the wife is justified in saying, 'I shall not return to you nor shall I allow you to have access to me while you are living in open adultery with another woman.' And it may be that in this case that which amounts to desertion has commenced, and that when the necessary time has elapsed the wife may claim relief both on the ground of adultery and desertion. At present, however, I am of opinion that desertion for two years is not established, and it will be for the petitioner to consider whether or not she will take a decree for judicial separation; or, if the facts that I have suggested warrant it, file another petition when the two years have elapsed." This was, I am informed, afterwards followed up by a further demand for relief on the grounds of desertion and adultery, and that then a divorce was granted. I shall follow that authority. But quite apart from that, and had the authority not existed, I should have held that in the present case, the conduct of the husband did amount to desertion from the month of August, 1885. I, therefore, pronounce a decree nisi with costs.

Solicitor for petitioner: *M. Corbett*.

Solicitors for respondent: *Field, Roscoe & Co., for Atkinson, Saunders & Co., Manchester*.

(1) 9 P. D. 245.

W. L.

1888

GARCIA
v.
GARCIA.
Butt, J.

1888

June 17.

PHILLIPS v. PHILLIPS.

Judicial Separation—Separate Property claimed by Wife—Injunction—Inquiry by Registrar—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 17.

A wife who had obtained a decree for judicial separation against her husband claimed certain furniture in his house as her separate property, and applied for an order that he should deliver it up to her. The husband denied that the furniture was her separate property:—

Held, that under the 17th section of the Married Women's Property Act, 1882, the wife was entitled to an inquiry by the registrar as to whether the furniture was her separate property.

IN this case a decree of judicial separation was pronounced on March 21 at the instance of the wife on the ground of the husband's cruelty.

On March 6 she had obtained an injunction restraining her husband from selling or otherwise disposing of certain furniture in his house which she claimed as her separate property, and subsequently she gave notice of a motion for an order directing the husband to deliver up the furniture, which now came on for argument.

The respondent appeared in person, and denied that the furniture was his wife's separate property.

Middleton, for the petitioner. Under the 17th section of the Married Women's Property Act when any question arises between a husband and wife as to the title to or possession of property, either party may apply by summons or otherwise in a summary way to any judge of the High Court of Justice, and the judge may make such order with respect to the property in dispute, or may direct any inquiry concerning the matters in question to be made in such manner as he may think fit.

BUTT, J. I will direct an inquiry by the registrar as to whether the furniture claimed by the petitioner is her separate property or not—and in the meantime the application for the delivery of the furniture must stand over.

Solicitors for petitioner: *Abbot & Earle*.

W. L.

[PRIVY COUNCIL.]

EX PARTE READ AND OTHERS.

Ecclesiastical Law—Petition—Jurisdiction of Archbishop—Refusal to cite a Bishop—Appeal.

J. C.*

1888

July 28;
Aug. 3.

The Archbishop has jurisdiction to cite a bishop in respect of ecclesiastical offences, and an appeal lies to Her Majesty in Council from his refusal to exercise such jurisdiction.

THIS was a petition on appeal from the refusal of the Archbishop of Canterbury to grant the prayer of the petitioners, Read of Cleethorpe, in the county and diocese of Lincoln, and three other residents therein, all members of the Church of England, for a citation or decree to issue citing the Bishop of Lincoln to appear and answer certain articles alleging that he had offended against the laws ecclesiastical in reference to ritual.

The petition presented to the Archbishop alleged that the Bishop of Lincoln had on certain days in December, 1887, whilst officiating as bishop in the parish church of St. Peter in the city of Lincoln, offended against the laws ecclesiastical by having, amongst other things, taken part in the face of the congregation in the mixing of water with the sacramental wine, and by having consecrated the said water and wine when so mixed, and by having afterwards administered the same to the communicants, and also by having ceremonially, in the presence of the congregation, made the sign of the cross, and by having done other acts, all of which had been determined by the Judicial Committee to be violations of the laws ecclesiastical.

That petition was presented to the Archbishop on the 2nd of June, 1888, at Lambeth Palace. It alleged the Archbishop's jurisdiction to cite before him or his Vicar-General suffragan bishops of the province of Canterbury. It referred to the case of *Lucy v. Bishop of St. David's* (1).

* *Present* :—THE LORD CHANCELLOR (LORD HALSBURY), LORD HERSCHELL, LORD HOBHOUSE, LORD MACNAGHTEN, and SIR BARNES PEACOCK.

[*Ecclesiastical Assessors*] :—THE BISHOP OF LONDON, THE BISHOP OF SALISBURY, THE BISHOP OF ELY, THE BISHOP OF MANCHESTER, THE BISHOP OF SODOR AND MAN.

(1) 1 Ld. Raym. 447; 12 Mod. Rep. 237.

1888

EX PARTE
READ.

On the 26th of June, the Archbishop, having taken time to consider, informed the petitioners by letter that he declined to issue a citation or decree as prayed. The letter stated that the Archbishop had failed to satisfy himself that he had jurisdiction in the case, and was unable to proceed to exercise any discretion in the matter without some instruction being produced from a competent Court that the jurisdiction referred to in the case of *Lucy v. Bishop of St. David's* was applicable to the petitioners' case.

Sir Horace Davey, Q.C. (Dr. Tristram, Q.C., and Danckwerts, with him), for the petitioners:—

There were three questions involved: (1.) Had the Archbishop jurisdiction to cite the Bishop in respect of the offences alleged; (2.) Did an appeal lie from the Archbishop to the Queen in Council; (3.) If so, did an appeal lie from the refusal to issue a citation in this case. As to (1), it was clear that 3 & 4 Vict. c. 86, and 37 Vict. c. 85, only applied to clerks and not to bishops. But 23 Hen. 8, c. 9 (Act of Citation), contemplated the citation of bishops: see one of the exceptions in sect. 3. And 13 Car. 2, c. 12, which affirmed the Act of the Long Parliament abolishing the High Commission Court, contained some important reservations. See Lyndwood's Provinciale, p. 277, bk. v., tit. i., De Accusationibus. For the *Bishop of St. David's Case* reference was made to 1 Ld. Raym. 447; 12 Mod. 237; 1 Ld. Raym. 539, and 14 State Trials, 447, 454, note, 462 and 463; also to Rothery's Parliamentary Return of Ecclesiastical Cases heard before the Court of Delegates. For references to this case in works of ecclesiastical authority, see Bishop Gibson's Codex (ed. 1771), p. 1006, tit. 44, c. 2; Sir R. Phillimore's Eccl. Law, vol. i., pp. 84, 92. Reference was also made to a Collection of Decretals (ed. Paris, 1705), p. 301, a decretal of Innocent III., A.D. 1216, shewing that before the Reformation it was clear that the Archbishop could exercise jurisdiction personally, even if he could not do so by delegate: Ayliffe's Parergon (ed. 1726), p. 92. From the necessity of the case there must be jurisdiction somewhere. It was not in the Court of Arches, which did not exercise coercive jurisdiction in the first instance, see p. 31 of

Appendix to the Report of the Ecclesiastical Courts Commission. Though Lord Penzance is official principal of that Court, his jurisdiction depends partly on his patent under the seal of the Archbishop. Reference was made to the *Bishop of Lichfield's Case* in 1685, see Cardwell's *Documentary Annals* (ed. 1844), vol. ii., p. 352; where Archbishop Sancroft's suspension of the Bishop is set out at length; *Dale's Case* (1); 2nd vol. of the above report, p. 663. The commission was appointed in 1881 and reported in 1883, on p. 666 is printed the patent of the Vicar-General, who is the official principal of the Archbishop, though not of the Court of Arches. With regard to questions (2) and (3), see 25 Hen. 8, c. 19, s. 4, which gives an appeal from the Archbishop to the delegates, whose authority is now vested in the Judicial Committee: see *Gorham's Case* (2); Conset's *Practice in Ecclesiastical Courts* (ed. 1708), p. 186, cited by Dr. Stephens, vol. i., p. 17; Ayliffe's *Parergon*, pp. 71, 72. There are two classes of appeal; first, from definitive sentences, second, extra-judicial appeals from grievance inflicted, or likely to be inflicted, otherwise than by a document under seal of the Court. There had been appeals from a mere refusal, as here, to issue a citation, see *Whiston's Case* (3); *Sheppard v. Bennett* (4). Reference was made to sect. 15 of the Church Discipline Act. The Judicial Committee might issue a citation themselves, or they might entertain the appeal and advise Her Majesty to remit the case to the Archbishop to be heard and determined by him.

The respondent did not appear, though the case stood over from the 20th of July that he might be served, and also that the ecclesiastical assessors might be present.

The judgment of their Lordships was delivered by

LORD HALSBURY, L.C. :—

Their Lordships are of opinion that the Archbishop has jurisdiction in this case. They are also of opinion that the abstaining by the Archbishop from entertaining the suit is matter of appeal

1888

EX PARTE
READ.

1888

Aug. 3.

(1) 6 Q. B. D. 376, 393. (2) 15 Q. B. 52, 67. (3) 1 Comyn's Rep. 199.
(4) Law Rep. 2 P. C. 450; S. C. Law Rep. 2 Ad. & Eccl. 335, 344.

1888

EX PARTE
READ.

to Her Majesty; they desire to express no opinion whatever whether the Archbishop has, or has not, a discretion whether he will issue a citation; and they will humbly advise Her Majesty to remit the case to the Archbishop to be dealt with according to law.

Solicitors for the petitioners: *Wainwright & Baillie.*

END OF VOL. XIII.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1889, will be as follows :—

In the First Series,
40 Ch. D.

In the Second Series,
22 Q. B. D. 14 P. D.

In the Third Series,
14 App. Cas.

INDEX.

ECCLESIASTICAL.

ARCHBISHOP, JURISDICTION OF—Refusal to cite bishop—Appeal. - - 221
See PETITION.

CURATE—*Notice to quit Cure*—1 & 2 Vict. c. 106, ss. 95, 112.] A notice by an incumbent to a curate to quit his curacy, given under 1 & 2 Vict. c. 106, s. 95, is not a notice within or subject to the regulations prescribed by s. 112 of the same statute. *TANNER v. SCRIVENER* - - 128

INCUMBENT—Curate—*Notice to quit cure* 128
See CURATE.

PETITION—*Jurisdiction of Archbishop—Refusal to cite a Bishop—Appeal.*] The Archbishop has jurisdiction to cite a bishop in respect of ecclesiastical offences, and an appeal lies to Her Majesty in Council from his refusal to exercise such jurisdiction. *EX PARTE READ* - - - 221

STATUTES :—
1 & 2 Vict. c. 106, ss. 95, 112 - - 128
See CURATE.

PROBATE.

ADMINISTRATOR—*Administration de bonis non*—*No Residue—Grant to Specific Legatee without Citation or Renunciation of Residuary Legatee—Practice.*] Upon an application for a grant of administration de bonis non it appeared that the residuary legatee resident abroad had had notice by letter, and that he had no beneficial interest, there being actually no residue :—*Held*, that the grant might be made to a specific legatee, without requiring the residuary legatee to be cited, or to renounce. *IN THE GOODS OF E. WILDE* 1.

2. — *Will—Colonial Grant—Roman-Dutch Law—Substitution of Executors—Grant of Administration with Will annexed to Administrator-General of Colony—Practice.*] A testator domiciled in British Guiana by his will appointed two executors—one resident in the colony, the other in England—with power of substitution in the event of either or both being unable or unwilling to act. The executor resident in the colony administered the estate on his own behalf and on behalf of the other executor until he returned to this country to reside here permanently.—By the law of the colony an executor under such circumstances had the right to substitute as executor the Administrator-General of the colony, who thereupon became possessed of all the powers

ADMINISTRATOR—*continued.*

necessary for the administration of the estate. This substitution had been effected by the executor before leaving the colony, and there being estate in this country which required a personal representative here, the Court made a grant of administration with the will annexed to persons nominated as his attorneys by the Administrator-General until such time as the Administrator-General or the executor resident in this country who had not renounced should apply, and without requiring justifying security. *IN THE GOODS OF BLACK* - - - 5

3. — *Grant to a Creditor—Absconding Administrator—Revocation of Grant—New Grant to Next of Kin—Practice.*] A grant of administration of the estate of an intestate was made to a creditor, who, after his debt had been fully satisfied, absconded, and could not be found.—A personal representative of the estate being required in an action in the Chancery Division, the Court revoked the grant to the creditor without citing him, and made a new grant to the sole next of kin of the deceased. *IN THE GOODS OF BRADSHAW* - - - 18

4. — *Intestacy—Indian Divorce—Grant to Next of Kin without citing former Wife.*] Ad-

ADMINISTRATOR—*continued.*

ministration of the estate of a deceased intestate whose marriage had been dissolved by the High Court of Judicature in Bombay, granted to his next of kin without citing the divorced wife. **IN THE GOODS OF NARES** - - - 35

5. — *Administration with Will annexed—Grant to a Stranger in Blood—Minor.*] Where upon an application for administration with the will annexed it appeared that the testator's children were minors, the Court granted administration to a stranger in blood elected by the children as their testamentary guardian, without notice to the next of kin entitled to the grant, on proof that one had renounced and that the remainder were at a distance, or that their place of residence was unknown. **IN THE GOODS OF G. H. WEBB** - - - - - 71

CREDITOR—Administration—Grant to creditor—Absconding administrator—Revocation of grant - - - - 18
See ADMINISTRATOR. 3.

EXECUTION—Will—Acknowledgment - 67
See WILL. 2.
— Acknowledgment of testator's signature 102
See WILL. 3.

FOREIGN LAW—Will—Colonial grant—Roman-Dutch law—Substitution of executors—Grant of administration with will annexed to Administrator-General of colony - - - - 5
See ADMINISTRATOR. 2.

INJUNCTION—Executor intermeddling in the estate before probate—Writ of summons for injunction and appointment of receiver granted on application of co-executor - - - - 36
See WILL. 6.

MINOR—Next of kin—Administration—Will annexed—Grant to a stranger in blood
See ADMINISTRATOR. 5. [71]

MISTAKE—Will—Mistake in copying draft 7
See WILL. 4.

PRACTICE—Administration de bonis non—Grant to specific legatee without citation or renunciation of residuary legatee 1
See ADMINISTRATOR.

— Grant of administration with will annexed to Administrator-General of colony 5
See ADMINISTRATOR. 2.

— Administration—Intestacy—Indian divorce—Grant to next of kin without citing former wife - - - - 35
See ADMINISTRATOR. 4.

RECEIVER—Appointment of—Executor intermeddling in estate before probate 36
See WILL. 6.

REVOCATION—Administration—Absence of administrator—Citation unnecessary 18
See ADMINISTRATOR. 3.

STATUTES—1 Vict. c. 26, s. 9 - - - 102
See WILL. 3.

WILL—*Holograph Codicil—Attesting Witnesses unable to recollect the Execution—Presumption—Probate.*] A testator left a codicil entirely in his own handwriting, written on the third side of the sheet of foolscap the first side of which contained his will. There was an attestation clause in proper form, and the testator had signed his name at the foot of the codicil, but there being no more space on the sheet the names of the attesting witnesses appeared at the bottom of the second page opposite the attestation clause.—The attesting witnesses acknowledged their signatures, but had no recollection of having signed the paper nor of ever having seen it before.—*Held*, that the codicil was duly executed. **WOODHOUSE v. BALFOUR** - - - - - 2

2. — *and Codicil—Execution—Acknowledgment.*] A testatrix exhibited a codicil to her last will, which was entirely in her own handwriting, to one of the attesting witnesses, telling her she had something which required two witnesses. Subsequently the second attesting witness having come into the room, they both signed, but the testatrix did not tell them that it was a testamentary paper, nor did they know what sort of paper it was that they had attested. They did not recollect seeing the testatrix sign, but one of them was clear that her signature was there at the time they signed.—*Held*, that this was a sufficient acknowledgment by the testatrix of her signature, and that the codicil was entitled to probate. **DAINTREE & BUTCHER v. FASULO** 67

3. — *and Codicil—Execution—Acknowledgment of Testator's Signature—Wills Act, 1837 (1 Vict. c. 26) s. 9.*] A testatrix exhibited a codicil to her last will, which was entirely in her own handwriting, to one of the attesting witnesses, telling her she had something which required two witnesses. Subsequently, the second attesting witness having come into the room was asked, either by the testatrix or by the other attesting witness in her presence, to sign it, and they both signed, but the testatrix did not tell them that it was a testamentary paper, nor did they know what sort of paper it was that they had attested. They did not recollect seeing the testatrix sign, but one of them was clear that her signature was there at the time they signed.—*Held*, affirming the decision of Butt, J., that this was a sufficient acknowledgment by the testatrix of her signature, and that the codicil was entitled to probate. **DAINTREE & BUTCHER v. FASULO** - C. A. 102

4. — *Mistake in copying the Draft—Will altered to correspond with Draft.*] A testator in the draft of his will, which was duly executed and read over to him before execution, bequeathed a legacy to the Bristol Royal Infirmary. In the will, which was not read over to him, the bequest by a mistake in the engrossment was to the British Royal Infirmary.—The Court, subject to an affidavit that there was no such institution as the British Royal Infirmary, granted probate of the will with the word "Bristol" substituted for "British." **IN THE GOODS OF BUSHELL** - 7

5. — *and Codicil—Substituted Trustee—Executor according to the Tenor.*] Directions to

WILL—*continued.*

get in the estate of the testator, and to distribute it in a certain manner after the payment of all funeral and other expenses:—*Held*, sufficient to constitute a trustee an executor according to the tenor. IN THE GOODS OF LUSH - - 20

6. — *Executor intermeddling in the Estate before Probate*—*Writ of Summons for Injunction, and Appointment of Receiver granted on Application of co-Executor.*] Where an executor had, before probate, and without the assent of his co-executor, intermeddled in the estate and made

WILL—*continued.*

preparations to dispose of a portion of it, the Court gave leave to the co-executor to issue a writ against him claiming an injunction to restrain him from dealing with the estate before probate, and praying for the appointment of a receiver. IN THE GOODS OF MOORE - - - 36

— Colonial grant—Roman-Dutch law—Substitution of executors—Grant of administration with will annexed to Administrator-General of colony - - 5
See ADMINISTRATOR. 2.

DIVORCE.

ADULTERY—Conduct conducing to—Divorce

See DIVORCE. [11

— Conduct conducing to—Divorce - 12, 141

See PRACTICE. 11, 12.

ALIMONY—Wife found guilty of adultery—

See PRACTICE. 6. [91

CASES:—*Drummond v. Drummond* (30 L. J. (M. & D.) 177) affirmed - - 141

See PRACTICE. 12.

— *Murfett v. Smith* (12 P. D. 116) followed

See PRACTICE. 13. [100

— *Pool v. Sacheverell* (1 P. Wm. 675) questioned - - - 73

See PRACTICE. 4.

— *Wells v. Wells* (3 Sw. & Tr. 542) discussed

See PRACTICE. 6. [91

CHARGING ORDER—Solicitor—"Property recovered or preserved" - - 180

See PRACTICE. 16.

CHILDREN, CUSTODY OF—Order depriving parent of children—Guardianship of Infants Act, 1886 - - 90

See PRACTICE. 7.

— Divorce—Sequestration—Enforcing order

See PRACTICE. 8. [166

CONTEMPT—Advertisement offering reward for evidence—Attachment - - 73

See PRACTICE. 4.

COSTS—Divorce—Wife possessed of separate estate—Application to condemn wife in costs—Notice—Practice - - 23

See PRACTICE. 14.

— Divorce—Cross-petitions by husband and wife—Both parties found guilty of adultery - - 12

See PRACTICE. 11.

— Judicial separation—Petition by wife—Wife's costs of appeal - - 12, 141

See PRACTICE. 11, 12.

— Queen's proctor—Unsuccessful intervention

See PRACTICE. 5. [94

DESERTION—*continued.*

shooting, but in fact he went to Australia to escape arrest on a charge of embezzlement. Up to the time of his flight he had been carrying on an adulterous intercourse with a woman with whom he made arrangements to go away, and he was found living in adultery with another woman at Sydney. Subsequently he was brought back to this country in custody, tried, and sentenced to ten years' penal servitude:—*Held*, that the circumstances under which the respondent left his wife constituted desertion, and that the desertion would continue notwithstanding the fact that he was brought back to this country in custody and prevented by his imprisonment from returning to his wife. *DREW v. DREW* - - - 97

2. — *Evidence.*] At the trial of a petition by the wife for divorce from her husband on the ground of adultery and desertion it appeared that they were married in 1866, and that after four years' cohabitation it was agreed between them, on the husband falling into difficulties, that a house and shop should be taken for the wife, and that she should carry on business in a separate name. From this time the parties had never lived together, though the husband occasionally visited his wife and slept with her, and he made her an allowance. His visits were always as far as possible made in secret, and though his wife remonstrated he refused to recommence open and avowed cohabitation. In 1885 the wife had reason to suspect that her husband was carrying on adulterous intercourse, and she never afterwards cohabited with him. In 1888 she obtained positive proof of his adultery, and thereupon commenced the present suit:—*Held*, that in the circumstances there was sufficient evidence of desertion for two years without reasonable cause by the husband. *GARCIA v. GARCIA* - - 216

— Adultery previous to decree revived 89

See RESTITUTION.

— Proof of, insufficient—Adjournment - 22

See PRACTICE.

DIVORCE—*Conduct conducing to Adultery—Delay.*] In a suit by a husband for divorce on the ground of adultery, which was not defended, the husband admitted that on his wife becoming addicted to habits of intoxication he left her, after eleven years of cohabitation, broke up his home and sold his furniture with the intention of

DESERTION—*Husband sentenced to Penal Servitude.*] In a wife's suit for dissolution on the ground of adultery and desertion, it appeared that the respondent when he left his wife stated to her that he was going to Ireland for a week's

DIVORCE—*continued.*

getting rid of her. He made her no allowance and never saw her until eight years after the separation, when he met her by accident. Five years after that meeting he filed the petition. The adultery was proved:—*Held*, that the conduct of the husband disentitled him to a divorce, and that the petition must be dismissed. *HEYES v. HEYES AND MASON* - - - 11

DOMICIL—Divorce—Jurisdiction - - - 132
See PRACTICE.

— Nullity—American divorce - - - 37
See PRACTICE. 2.

EVIDENCE—Desertion - - - 216
See DESERTION. 2.]

— Divorce—Sequestration—Summoning persons to give information - - - 166
See PRACTICE. 8.

FELONY—Husband sentenced to penal servitude—Desertion - - - 97
See DESERTION.

FOREIGN LAW—Domicil—American divorce
See PRACTICE. 2. [37]

HUSBAND AND WIFE—Children, custody of—Divorce—Sequestration—Enforcing order - - - 166
See PRACTICE. 8.

JUDICIAL SEPARATION—Husband and wife both found guilty of adultery—Husband guilty of aggravated cruelty 12, 141
See PRACTICE. 11, 12.

— Inquiry as to wife's separate property 220
See PRACTICE.

NEW TRIAL—Divorce—Misdirection—Insufficient statement of grounds in notice
See PRACTICE. 13. [100]

NOTICE—Divorce—Application to condemn wife in costs—Separate estate - - - 23
See PRACTICE. 14.

NULLITY—Agreement not to sue—Consideration—Bar - - - 210
See PRACTICE. 3.

PRACTICE—Divorce—*Act on Petition—Domicil—Jurisdiction.*] In proceedings for divorce it appeared that the petitioner had been born in France of French parents. When he was ten years old his parents settled in England, and the father subsequently obtained letters of naturalization as a British subject. The petitioner when eighteen years of age went to Canada, where he took up the business of farming, bought a farm, served in the Canadian volunteers, and discharged the duties of a citizen of Canada. In 1878 he married the respondent, who was a Canadian, and in 1883 he brought her with their children to this country, where he resided for some years with his father. He had occasion to return several times to Canada, as he alleged, to look after his farm, and from 1884 was only seven months in this country. The respondent remained in England until the date of the alleged adultery, when

PRACTICE—*continued.*

she visited France:—*Held*, that the petitioner had not lost his English domicile—that the matrimonial home was in England, and that the Court had therefore jurisdiction over the proceedings. *D'ETCHEGOYEN v. D'ETCHEGOYEN* - - - 132

2. — *Nullity—American Divorce—Domicil—Jurisdiction.*] The petitioner, being a domiciled Englishwoman, in 1872 went through a form of marriage with an American citizen. She cohabited with him until February, 1879, in the United States, and in April, 1879, the Supreme Court of Columbia pronounced a decree dissolving the marriage on the ground of the husband's incapacity. She then returned to this country, and in 1886 presented a petition to this Court praying for a declaration of nullity of marriage:—*Held*, that as the marriage was voidable and not void the petitioner had acquired an American domicile, that the American Court had jurisdiction to dissolve the marriage, and that there being no longer a marriage in existence this Court had no jurisdiction. *TURNER v. THOMPSON* - - - 37

3. — *Nullity—Agreement not to sue—Consideration—Bar.*] In a petition by husband against wife praying that the marriage celebrated between them might be declared null and void on the ground of her incapacity, the respondent pleaded that she and the petitioner after a year's cohabitation had agreed to live apart, and had bound themselves not to make any claim against each other either in a court of law or equity; and that if either party should break the agreement the other should be entitled to an injunction to restrain such breach. That it was further agreed that if the respondent committed a breach of the agreement the petitioner should be entitled to proceed in this Court for a declaration of nullity. Averment—that there had been no breach of the agreement on the part of the respondent:—*Held*, that the respondent's agreement not to sue was a sufficient consideration for the husband's engagement to do the like, and that such an agreement although not by deed was therefore a bar to a petition for declaration of nullity. *ALDRIDGE v. ALDRIDGE (OTHERWISE MORTON)* - - - 210

4. — *Advertisement offering Reward for Evidence—Contempt of Court—Attachment.*] In a suit for divorce on the wife's petition on the grounds of adultery and cruelty, the husband caused to be printed and published about the district in which the wife and her family resided a notice purporting to be signed by him, offering a reward of 25*l.* for evidence of the confinement of a young married woman of a female child, "probably not registered":—*Held*, that this was a contempt of Court as tending to prejudice the petitioner, and discrediting her in the assertion of her rights, and a writ of attachment ordered to issue.—*Pool v. Sacheverell* (1 P. Wm. 675) questioned. *BUTLER v. BUTLER* - - - 73

5. — *Intervention of Queen's Proctor—Costs.*—20 & 21 Vict. c. 85, s. 34; 23 & 24 Vict. c. 144, s. 7.] The Court refused to condemn a co-respondent who had not been dismissed from the suit in the costs of an unsuccessful intervention by the Queen's Proctor under 23 & 24 Vict. c. 144, s. 7. *BLACKHALL v. BLACKHALL AND CLARKE* [94]

PRACTICE—continued.

6. — *Alimony pendente Lite—Wife found guilty of Adultery—Divorce Act, 1857 (20 & 21 Vict. c. 85), s. 32.]* Where alimony pendente lite has been allotted to a wife in a petition for divorce, such alimony ceases upon a verdict finding her guilty of adultery, but the Court may in its discretion make an order for the alimony to continue.—Decision of Butt, J., affirmed.—*Wells v. Wells* (3 Sw. & Tr. 542) discussed. DUNN v. DUNN — — — — — C. A. 91

7. — *Order depriving Parent of Custody of Children—Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 7.]* In a suit by the wife for divorce on the ground of adultery coupled with cruelty, which was of an aggravated character, the Court, after pronouncing a decree nisi, made an order under s. 7 of the Guardianship of Infants Act, 1886, declaring the respondent, who did not appear to oppose the application, to be an unfit person to have the custody of the children. SKINNER v. SKINNER — — — — — 90

8. — *Married Woman—Custody of Children—Sequestration—Enforcing Order—Summoning Persons to give Information—Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 35, 52.]* A husband having obtained a decree nisi for divorce, an order was made for the wife to give up his children to him. This order was not served upon her personally, but it appeared that she knew of the order and kept out of the way to avoid service. The children were not delivered up, and the father could not discover where they were. A further order was thereupon made for a sequestration to issue against the estate of the wife, and directing her mother, sister, and brother-in-law, who were shewn to be in communication with her, to attend to be examined as to their knowledge of the whereabouts of the wife and children. The wife was entitled under her marriage settlement to an income for her separate use with a restraint on anticipation.—*Held*, by the Court of Appeal, first, that the sequestration was properly issued without personal service of the previous order; secondly, that it was no objection to the form of the writ of sequestration that it was in general terms without expressly defining the property of the wife which was subject to sequestration; thirdly, that the sequestration could not during the coverture be enforced against future income, as to which the wife was restrained from anticipation, but that it applied to arrears which were due when the order for sequestration was made.—But *held*, that there was no jurisdiction to order the mother, sister, and brother-in-law to attend and be examined as to their knowledge of the whereabouts of the wife and children, for that s. 52 of the Divorce Act, 1857 (20 & 21 Vict. c. 85), which provides that an order of the Divorce Court shall be enforced in the same way as an order of the Court of Chancery, does not enable the Divorce Court to exercise a power of obtaining discovery in aid of the execution of its order which the Court of Chancery had never exercised, except in reference to wards of Court, and s. 35, though it gave the Divorce Court powers as to the maintenance and education of the children of the parties, did not make them wards of that Court, and although it

PRACTICE—continued.

might give jurisdiction to summon persons to give evidence if there was any issue to be tried as to the maintenance and education of the children, did not give power to call upon them to give information where there was no issue to be tried. HYDE v. HYDE — — — — — C. A. 166

9. — *Divorce—Judicial Separation—Separate Property claimed by Wife—Injunction—Inquiry by Registrar—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 17.]* A wife who had obtained a decree for judicial separation against her husband claimed certain furniture in his house as her separate property, and applied for an order that he should deliver it up to her. The husband denied that the furniture was her separate property.—*Held*, that under the 17th section of the Married Women's Property Act, 1882, the wife was entitled to an inquiry by the registrar as to whether the furniture was her separate property. PHILLIPS v. PHILLIPS — 220

10. — *Adultery and Desertion—Proof of Desertion insufficient—Adjournment—Supplemental Petition.]* In a suit by the wife for dissolution of the marriage on the ground of adultery coupled with desertion, the adultery was proved, but the evidence of desertion fell short of the required period of two years by several months.—The hearing was adjourned, and twelve months afterwards, the respondent not having returned to cohabitation, the petitioner filed a supplemental petition charging desertion, on proof of which the Court granted a decree nisi. WOOD v. WOOD 22

11. — *Divorce—Cross-petitions by Husband and Wife—Both Parties found guilty of Adultery—Husband found Guilty of aggravated Cruelty—Judicial Separation ordered—Co-respondent not condemned in Costs.]* A husband and wife in cross-petitions for dissolution of the marriage, charged each other with adultery, and the wife in addition charged her husband with cruelty. The cruelty consisted of acts of violence and indecent assault on an infant daughter of the marriage. The wife also alleged that the husband had connived at her adultery.—The Court found both husband and wife guilty of adultery, and the husband guilty of the cruelty charged, and holding that if all relief were refused, the cruelty might be continued, pronounced a decree of judicial separation, giving the custody of the children of the marriage to the wife provisionally until the relatives could take charge of them.—On the charge of connivance the finding of the Court was in favour of the husband, but, having regard to the circumstances, the Court declined to condemn the co-respondent in costs. OTWAY v. OTWAY 12

12. — *Divorce—Cross-petitions by Husband and Wife—Husband and Wife both found guilty of Adultery—Husband found guilty of Cruelty also—Judicial Separation—Right of Wife to Relief—Costs of Wife—Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 7, 16, 17, 22, 31.]* A judicial separation can only be granted where the petitioner comes to the Court with a pure character, and is free from all matrimonial misconduct. Accordingly where a husband and wife had both been found guilty of adultery, and the husband had also been found guilty of cruelty, it was *held* by the Court of Appeal, reversing the

PRACTICE—continued.

decision of Butt, J., that the Court had no jurisdiction to make a decree of judicial separation on the ground of such cruelty, however aggravated its character might be.—*Drummond v. Drummond* (30 L. J. (P. M. & D.) 177) approved.—A husband and wife who were married before 1882, presented cross-petitions for dissolution of marriage, the wife's petition being presented before that of her husband. They were both found guilty of adultery, and the husband was also found guilty of cruelty of an aggravated character. The judge refused to decree dissolution of marriage, but granted the wife a decree for judicial separation, and gave her her costs. The husband having appealed, the Court of Appeal discharged the order for judicial separation:—*Held*, that the wife was entitled, notwithstanding her adultery, to her costs both in the Court below and on the appeal.—*Semble*. If the wife had been herself the appellant, and had been unsuccessful, she would not have had her costs of the appeal.—Whether the Rules of the Divorce Court as to the wife's costs are applicable to women married since the Married Women's Property Act, 1882, *quære*. OTWAY *v.* OTWAY. OTWAY *v.* OTWAY and HOFFER - - - - - C. A. 141

13. — *New Trial—Misdirection—Insufficient Statement of Grounds in Notice—Order XXXIX., r. 3.* Order XXXIX., r. 3—which requires that when a new trial is applied for on the ground of misdirection the particulars of the alleged misdirection should be specifically stated in the notice—is applicable to proceedings in a divorce suit.—*Murfett v. Smith* (12 P. D. 116) followed. TAPLIN *v.* TAPLIN and HOLLAND - - - 100

14. — *Husband's Petition—Wife possessed of Separate Estate—Application to condemn the Wife in Costs—Notice.* Where, on a husband's petition for divorce, application was made to condemn the wife, who had not appeared to defend the suit, in costs, the Court declined to entertain the application until she had received notice of it. FIELD *v.* FIELD and DENTON - - - 23

15. — *Divorce—Wife's Suit—Permanent Maintenance—Property liable to be charged—Prohibition against Alienation—Forfeiture—Order—20 & 21 Vict. c. 85, s. 32—29 & 30 Vict. c. 32, s. 1.* In a petition by a wife for permanent maintenance after the dissolution of her marriage on the ground of adultery and cruelty, it appeared that the husband, in addition to his pay and allowances as a surgeon in her Majesty's navy, amounting to 22*ss.* 2*s.* 6*d.*, was also entitled under the will of his father to an income amounting to 10*l.* 4*s.* 6*d.*, arising from houses in the city of Cork and certain shares vested in trustees, being a third share of the father's estate, upon trust "for the sole use and benefit" of the respondent, and "to be assigned, transferred, and handed over to him as soon as conveniently may be" after the decease of the father. The will directed that if any of the three sons of the testator should die unmarried and without issue his share should go to the survivors, and it was further provided that neither of the sons of the testator should have power to mortgage, sell, alien, charge or incur any part of the property assigned to them, and that in the event of either of them doing so the trustees

PRACTICE—continued.

should stand possessed of his share:—*Held*, that the respondent took an estate in fee simple under the will, that the provision for forfeiture in case of alienation was therefore void, and that he must be ordered to secure to his wife an annual sum of 8*l.* for her life. CORBETT *v.* CORBETT - 136

16. — *Solicitor—Charging Order—Attorneys and Solicitors Act (23 & 24 Vict. c. 127), s. 28—"Property recovered or preserved"—Annual Sum secured to Wife under 20 & 21 Vict. c. 85, s. 32—Married Women's Property Act (45 & 46 Vict. c. 75), s. 1, sub-s. 3.* A decree for dissolution of marriage having been made on the wife's petition, an order was made under 20 & 21 Vict. c. 85, s. 32, directing her husband to secure to her for life the annual sum of 130*l.* Upon application by the solicitors who had acted for the wife under the petition for an order under 23 & 24 Vict. c. 127, s. 28, charging their costs upon such annual sum of 130*l.*:—*Held*, that such annual sum was "property recovered or preserved by the solicitors," and therefore liable to a charging order under s. 28; but the Court, reversing the decision of Butt, J., refused, in the exercise of its discretion, to make the order, on the ground that upon the facts it could not be presumed that the wife had entered into a contract with the solicitors so as to bind her separate property; that the husband was therefore *prima facie* responsible, and for anything that appeared the costs could be recovered from him. HARRISON *v.* HARRISON - - - - - C. A. 180

17. — *Variation of Settlements—Registrar's Report—Wife's Power of Appointment and Power of appointing New Trustees—22 & 23 Vict. c. 61, s. 5.* In a petition for variation of settlements after a decree of dissolution on account of the wife's adultery, the registrar by his report recommended that the power of appointment over the fund given to the wife by the settlement should be extinguished, and that she should be deprived of the power of appointing or joining in the appointment of new trustees. The petitioner had signified his willingness that the respondent should continue to receive 100*l.* a year out of 150*l.* settled on her.—The Court confirmed the first of these recommendations, but disallowed the second, on the ground that as the respondent was to continue to receive an income from the fund she had an interest in the appointment of trustees.—An order extinguishing the power of appointment of funds in the settlement, is an order made, within the words of the section, "with reference to the application of the whole or a portion of the property settled." BOSVILLE *v.* BOSVILLE - 76

— *Desertion—Evidence* - - - - - 216
See DESERTION. 2.

QUEEN'S PROCTOR—Unsuccessful intervention—Costs - - - - - 94
See PRACTICE. 5.

RESTITUTION—*Decree for Restitution of Conjugal Rights—Refusal to obey—Desertion—Adultery previous to Decree revived—47 & 48 Vict. c. 68, s. 5.* In a petition by a wife for divorce on the ground of adultery and desertion it appeared that the husband had failed to comply with a decree

RESTITUTION—*continued.*

for restitution of conjugal rights, and that he had also been guilty of adultery before the date of the decree:—*Held*, that sufficient proof of adultery and desertion had been to satisfy s. 5 of the Matrimonial Causes Act, 1884, and that the wife was entitled to a decree for divorce. **BIGWOOD** - - - - - 89

RULES:—Order XXXIX., r. 3 - - - 100
See PRACTICE. 13.

SEPARATE PROPERTY—Judicial separation—
Inquiry by registrar - - - 220
See PRACTICE. 9.

SETTLEMENTS—Variation of—Divorce - 76
See PRACTICE. 17.

SOLICITOR—Charging order—Divorce—Property recovered or preserved - 180
See PRACTICE. 16.

STATUTES—

20 & 21 Vict. c. 85, ss. 7, 16, 17, 22, 31 12, 141
See PRACTICE. 11, 12.
— s. 32 - - - - 91
See PRACTICE. 6.
— - - - - 136
See PRACTICE. 15.

STATUTES—*continued.*

20 & 21 Vict. c. 85, s. 32 - - - 180
See PRACTICE. 16.
— s. 34 - - - - 94
See PRACTICE. 5.
— ss. 35, 52 - - - 166
See PRACTICE.
22 & 23 Vict. c. 61, s. 5 - - - 76
See PRACTICE. 17.
23 & 24 Vict. c. 127, s. 28 - - - 180
See PRACTICE. 16.
23 & 24 Vict. c. 144, s. 7 - - - 94
See PRACTICE. 5.
29 & 30 Vict. c. 32, s. 1 - - - 136
See PRACTICE. 15.
45 & 46 Vict. c. 75, s. 1, sub-s. 3 - - - 180
See PRACTICE. 16.
— s. 17 - - - - 220
See PRACTICE. 9.
47 & 48 Vict. c. 68, s. 5 - - - 89
See RESTITUTION.
49 & 50 Vict. c. 27, s. 7 - - - 90
See PRACTICE. 7.

WILL—Property liable to be charged—Prohibition against alienation—Forfeiture 136
See PRACTICE. 15.

ADMIRALTY.

AFFIDAVIT—Admiralty—Reference—Cross-examination of deponent - - - 16
See PRACTICE. 5.

ARREST—Lien—Action in rem—Time—Attachment of claim - - - 82
See PRACTICE.

BOARD OF TRADE—Regulations—Carriage of goods - - - 119
See SHIPPING CASUALTY.

CARRIAGE—Grain—Merchant Shipping (Carriage of grain) Act, 1880 - - - 119
See SHIPPING CASUALTY.

CASES—*Raisby, The* (10 P. D. 114) distinguished [31]
— *Ticonderoga, The* (Swa. 215) explained 110
See COLLISION. 5.

COLLISION—*Regulations for Preventing Collisions at Sea, Art. 11.*] By Sir James Hannen, President:—Art. 11 of the Regulations for Preventing Collisions at Sea—which directs that a ship which is being overtaken by another shall shew from her stern to such last-mentioned ship a white light or a flare-up light—is infringed if such light is carried in any way other than is necessary to warn overtaking vessels.—Where therefore such light is so placed or carried as to be visible over part of the area of a side light it must be taken that there is a breach of art. 11. **THE PALINCRUS** - - - - 14

2. — *Damage*—*Regulations for Preventing Collisions at Sea, Art. 11.*] In an action for

COLLISION—*continued.*

collision it appeared that one of a pair of ordinary binnacle lamps in the plaintiffs' vessel was temporarily removed from its place and used as a stern light:—*Held*, that in the absence of affirmative evidence of its efficiency on the particular occasion it could not be deemed to be such a light as is required by art. 11 of the Regulations for Preventing Collisions at Sea. **THE PATROCLUS** 54

3. — *Regulations for Preventing Collisions at Sea, Art. 11.*] By art. 11 a ship which is being overtaken by another shall shew from her stern to such last-mentioned ship a white light or a flare-up light:—*Held*, that such light must be shewn not once and for a short time only, but from time to time while the ship is "being overtaken" within the meaning of the article. **THE ESSEQUIBO** - - - - 51

4. — *Ship—Relation of Tow and Tug—Liability of Vessel in Tow.*] A tug with a vessel in tow came into collision with another vessel, which was seriously injured by the tug, but not injured by the vessel in tow. The collision might have been avoided had there been a good look-out on the vessel in tow, and had she warned the tug that the latter was in danger of collision by continuing on her course:—*Held*, that the owners of the vessel in tow were liable.—Per Sir James Hannen (President). Under an ordinary contract of towage, the vessel in tow has control over the tug, and is therefore liable for the wrongful acts of the latter, unless they are done so suddenly as to prevent the vessel in tow from controlling them. **THE NIOBE** - - - 55

COLLISION—*continued.*

5. — *Maritime Lien—Action in Rem—Liability of Ship—Charterparty—Implied Agreement.* A tug while towing the plaintiff's vessel came into collision with and sank her. The tug was chartered by the defendants, a company, to work with their own tugs, and one of the terms on which the company towed vessels was that they would not be answerable for loss or damage to any vessel in tow of their tugs (which were specified by name) whether occasioned by the negligence of their servants or otherwise. The tug in question was not one of those specified, but the plaintiff was a director of the defendant company, and was aware of the chartering of the tug:—*Held*, that the plaintiff must be taken to have impliedly agreed to employ the tug on the same terms as the other tugs of the company, and that his claim was therefore barred by the condition.—By the terms of the above charterparty the defendants were to appoint a captain as pilot, and all damages were to be for charterer's account. The collision was occasioned solely by the negligence of the defendants' captain:—*Held*, that an action in rem would not lie against the tug, for the maritime lien arising from collision is not absolute, and the owners not being personally liable for this collision, and the charterers being exempted by the terms of their contract with the plaintiff, the *prima facie* liability of the vessel was rebutted.—*The Ticonderoga* (Swa. 215) explained. *THE TASMANIA* - - - - - 110

— Actions by shipowners and owners of cargo
— Limitation of liability—Admission on pleading - - - - - 24
See PRACTICE. 2.

— Damages—Agreement to provide vessel for particular voyage—Absence of definite charterparty - - - - - 61, 131
See PRACTICE.

— Maritime lien—Action in rem—Liability of ship—Charterparty—Implied agreement
See COLLISION. 5. [110]

CORPORATION—Foreign corporation—Writ—Address - - - - - 8
See PRACTICE. 11.

COUNTY COURT—Jurisdiction—"Agreement in relation to the use or hire of ship" 188
See SHIP. 2.

CROSS-EXAMINATION—Affidavit—Reference
See PRACTICE. 5. [16]

CROWN—Queen's ship—Salvage—Right to reward - - - - - 205
See SALVAGE. 4.

DAMAGE—Cargo of barley—Merchant Shipping (Carriage of Grain) Act—Two deck ship—Shifting-boards in lower hold—Feeders - - - - - 119
See SHIPPING CASUALTY.

— Jetty in tidal river—Vessel necessarily grounding—Implied representation by wharfinger as to condition of bottom of river - - - - - 157
See SHIP.

DAMAGES—Assessment of—Admiralty—Lord Campbell's Act (9 & 10 Vict. c. 93) 80
See PRACTICE. 6.

DAMAGES—*continued.*

— Collision—Agreement to provide vessel for particular voyage—Absence of definite charterparty - - - - - 61, 191
See PRACTICE. 8, 9.

INTEREST—Damages—Action tried in Admiralty Division as branch of High Court—Action transferred to Admiralty Division - - - - - 105
See PRACTICE. 7.

LIEN—Arrest of ship—Action in rem—Time of attachment of claim - - - - - 82
See PRACTICE.

LIMITATION OF LIABILITY—Fund in Court—Actions by shipowners and owners of cargo—Compromise by shipowners—Right of owners of cargo to prove for whole amount of damage - - - - - 24
See PRACTICE. 2.

— Ship—Collision—Priorities of claimants
See PRACTICE. 3. [125]

PILOTAGE—Vessel out of pilotage waters—Salvage - - - - - 160
See SALVAGE. 3.

PRACTICE—*Arrest—Lien—Action in rem—Admiralty Court Act, 1861 (24 Vict. c. 10), s. 4—Time of Attachment of Claim.* The lien of the plaintiff in an action in rem under s. 4 of the Admiralty Court Act, 1861, takes effect from the moment of the arrest of the ship. Where, therefore, such an action was commenced against a vessel belonging to a limited company, and the company after a warrant of arrest had been served was ordered to be wound up:—*Held*, that the official liquidator had no claim to the proceeds of the vessel in the hands of the Court as against the plaintiff. *THE CELLA* - - - - - C.A. 82

2. — *Damage—Collision—Actions by Shipowners and Owners of Cargo—Compromise by Shipowners—Order LII., r. 23—Limitation of Liability—Admission on Pleadings—Right of Owners of Cargo to prove for whole amount of Damage.* The defendants' vessel came into collision with and sank another vessel carrying cargo belonging to the plaintiffs. Actions were commenced by the plaintiffs and by the owners of the carrying vessel, but in the action between the latter and the defendants' vessel, the parties filed in the registry an agreement to a decree that both vessels were to blame and for the usual reference as to the damages. The defendants then brought an action for the limitation of their liability, and paid into Court the amount of their liability under the Merchant Shipping Acts. In their statement of claim they referred to the above-mentioned agreement, and in terms admitted that the collision was "in part caused by the improper navigation of their vessel." The plaintiffs, in their defence, did not notice this admission, or otherwise refer to the cause of the collision. The usual decree was made for limitation of liability, and the staying of the plaintiffs' action:—*Held*, first, that the agreement between the owners of the two vessels having been filed in the registry was, under Order LII., r. 23, equivalent to a decree

PRACTICE—continued.

of the Court, and that the owners of the carrying vessel were not entitled to have such agreement rescinded for the purpose of proving against the fund in Court for more than half the damage sustained by them. Secondly, that there was no admission on the pleadings by the plaintiffs as defendants in the limitation action which precluded them from claiming to prove against the fund for the whole amount of the damage sustained by them, and that in support of their proof an issue might be directed between them and the owners of the carrying vessel to determine whether the defendants' vessel was alone to blame for the collision. *THE KARO* - - - 24

3. — *Limitation of Liability—Priorities of Claimants—Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), s. 54.* The plaintiffs in an action to limit their liability paid into court the sum of 7862*l.* 0*s.* 10*d.*, being the amount of their statutory liability at the rate of 15*l.* per ton. The amount so paid into court being insufficient to satisfy in full claims against the plaintiffs in respect of loss of life and loss of goods, the registrar, by his report, found that the claimants in respect of loss of life were entitled to be paid out of the sum in court an amount equal to 7*l.* per ton, and that they and the claimants in respect of loss of goods should rank *pari passu* against the balance representing 8*l.* per ton. On objection to the report:—*Held*, that the report was right, as the Court had power to marshal the assets, and that the claimants, in respect of loss of goods had no right in priority to the claimants in respect of loss of life against the sum representing 8*l.* per ton. *THE VICTORIA* [125

4. — *Restraint—Co-owners—Arrest of chartered Ship—Damages—Sale—Liability of Purchaser—Liability of Trading Owners.* In an action of restraint it appeared that the plaintiffs, a minority of the co-owners, had given notice to the managing owner that they declined to be bound by any new charterparty. The managing owner, who had been appointed manager with the sanction of the plaintiffs, had on the day when the above notice was given to him concluded an arrangement for a charterparty, and had himself signed the charterparty, though it was not signed by the charterers till some days afterwards:—*Held*, that the charterparty was binding on the plaintiffs. A purchaser of shares in a ship, which at the time of the sale is on a voyage, is liable for the expenses of this voyage, and of the vessel's outfit for it, and is entitled to a share of the freight. Part-owners who do not dissent from the employment of a ship, and are aware that other part-owners have dissented, are liable to bear the expenses, and are entitled to receive the profits of the ship in the proportion which their shares bear to the number of shares in the ship, after the deduction of the shares of the dissentient part-owners. *THE VINDOBALA* - - - 42

5. — *Reference—Cross-examination of Deponent—Order XXXVII., r. 2—Order XXXVIII., r. 28.* Under Order XXXVII., r. 2—which enables the evidence in references in Admiralty actions to be given by affidavit—it is in the discretion of the registrar to refuse, if he thinks fit, to give weight to such evidence unless and until the deponent

PRACTICE—continued.

has been cross-examined on his affidavit, and where the deponent is a party to the action, he may, though resident abroad, be required to attend in this country for such cross-examination. *THE PARISIAN* - - - 16

6. — *Lord Campbell's Act (9 & 10 Vict. c. 93)—Order XXVII., r. 4—Assessment of Damages.* An action for damages under Lord Campbell's Act was commenced in the Admiralty Division, and no application was made to transfer the cause to any other Division:—*Held*, that upon default in pleading by the defendants the plaintiffs were entitled, under Order XXVII., r. 4, to enter interlocutory judgment and to have the damages assessed and apportioned by a jury. *THE ORWELL* [80

7. — *Interest—Damages—Action tried in Admiralty Division as Branch of High Court—Action transferred to Admiralty Division—Judicature Act, 1873, ss. 16, 24, sub-s. 6, Order XLIX., r. 3.* In an action in the Admiralty Division, which could not, prior to the Judicature Acts, have been tried in the Admiralty Court, the defendant made no objection to the jurisdiction, and interest was, according to the practice in the Admiralty registry, allowed on the assessed damages from the time when the plaintiff's claim arose. In another action transferred by consent, after verdict for the plaintiff, to the Admiralty Division for the assessment of the damages by the registrar and merchants, the same practice was followed in regard to the interest:—*Held*, affirming the decision of the President (12 P. D. 204), that interest on the damages was properly awarded by the registrar on the ground that the parties, in both cases, having proceeded on the understanding that the Admiralty practice should apply, had impliedly consented to abide by such practice. Per Fry, L.J. Under s. 24, sub-s. 6, of the Judicature Act, 1873, and in the absence of consent to the contrary, a common law action tried in, or transferred to, another Division is to be determined on the same common law principles as would have been applied to it in the Queen's Bench Division. *THE GERTRUDE. THE BARON ABERDARE* C.A. 105

8. — *Collision—Damages—Agreement to provide Vessel for particular Voyage—Absence of definite Charterparty.* In an action for a collision between two vessels it appeared that the defendants, the owners of one of the vessels, had made a verbal agreement with certain shipbrokers that on the arrival of the vessel in the Thames she should proceed to Antwerp, and there load goods for conveyance to the Black Sea by a specified route, and that the vessel had been accordingly, with the knowledge of the defendants, advertised to load for and sail on the route in question. Before the vessel could take her place at the loading-berth the collision took place, and she was prevented from loading and sailing as arranged:—*Held*, that notwithstanding the absence of a regular charterparty the defendants were entitled to recover damages arising from the inability to fulfil their contract, as there was a definite assurance that benefit would be derived from it. *THE ARGENTINO* - - - 61

9. — *Collision—Damages—Agreement to provide Vessel for particular Voyage—Absence of*

PRACTICE—*continued.*

definite Charterparty—Restitutio in integrum—Remoteness of Damage.] Previous to a collision between two vessels, the owners of one of them had made an oral arrangement with a firm of shipbrokers that the vessel upon the completion of the voyage upon which she was then engaged should go to Antwerp, and there load a cargo in turn as one of a line of steamers, and proceed by a particular route to the Black Sea. In consequence of repairs necessitated by the collision, the vessel was not ready to start for Antwerp so as to load in turn, and, by arrangement, another smaller vessel was substituted for the injured vessel, the latter vessel shortly afterwards taking the place of the substituted vessel on a less remunerative route.—In an action of damage the owners of the injured vessel sought to recover against the owners of the other colliding vessel a sum representing (1) the additional profit (calculated on the basis of the profits actually made by the substituted vessel) which would have been earned but for the substitution; (2) the loss of profit due to the difference in size of the two vessels; (3) the loss of time in loading the injured vessel for the substituted route:—*Held*, by the majority of the Court of Appeal (Lindley and Bowen, L.J.), that evidence of the profits made by the substituted vessel was inadmissible, and that the damages must be assessed at such a sum as would represent what a vessel of the description of the injured vessel might ordinarily and fairly be expected to earn, having regard to the fact that a contract had been entered into for her profitable employment:—By Lord Esher, M.R., that damages in respect of the loss of the agreement for the future hiring of the vessel were too remote to be recovered. **THE ARGENTINO C.A. 191**

10. — Sale of Ship.] An order will not be made for the sale of a vessel even upon the application of the owner, where such vessel is not proceeded against in the Court. **THE WEXFORD 10**

11. — Writ—Address—Foreign Corporation.—*Order II., rr. 3, 4—Appendix A., Forms, 1, 2.*] A writ in personam for service within the jurisdiction is invalidated by the omission of the address of the defendant.—Where therefore such a writ was addressed to a foreign corporation without giving its address:—*Held*, that, having regard to Order II., r. 3, the omission was material, and that the writ was invalid, and must be set aside. **THE W. A. SHOLTEN - - - 8**

REFERENCE—Cross-examination of deponent—Admiralty - - - - **16**
See PRACTICE. 5.

RESTRAINT—Ship—Co-owners—Arrest of chartered ship—Sale—Liability of purchaser
See PRACTICE. 4. **[42]**

RULES—*Order II., rr. 3, 4—Appendix A., Forms 1, 2* - - - - **8**
See PRACTICE. 11.

— **Order XXVII., r. 4** - - - - **80**
See PRACTICE. 6.

— **Order XXXVII., r. 2** - - - - **16**
See PRACTICE. 5.

RULES—*continued.*

— **Order XXXVIII., r. 28** - - - - **16**
See PRACTICE. 5.

— **Order XLIX., r. 3** - - - - **105**
See PRACTICE. 7.

— **Order LII., r. 23** - - - - **24**
See PRACTICE. 2.

SAILING RULES—*Art. 2* - - - - **14**
See COLLISION.

— *Collision—Regulations for preventing collisions at sea, Art. 11* - - - - **51**
See COLLISION. 3.

— *Collision—Regulations for preventing collisions at sea, Art. 11* - - - - **54**
See COLLISION. 2.

SALVAGE—*Agreement for particular Sum—Liability of Shipowners for Salvage of Cargo.*] A vessel, the value of which was 3500*l.*, and the cargo of which was worth 14,000*l.*, having been for three days on rocks in Castraes Bay, in the Gulf of Tartary, the master entered into an agreement with the salvors to pay them 200*l.* for each day of service, and a further sum of 2000*l.* in the event of the vessel being got or coming off the rocks during the continuance of the attendance of the salvors:—*Held*, that the agreement was fair and reasonable and binding on the owners of the vessel.—*Held*, also, that the owners of the vessel were liable for the whole amount agreed upon without any deduction in respect of the salvage of the cargo.—*The Raisby* (10 P. D. 114) distinguished. **THE PRINZ HEINRICH - - - 31**

2. — Award.] A vessel having got ashore on the Parkin Rock in the Red Sea, her master and part of the crew proceeded to Aden for assistance. During their absence the crew left on board were driven away by Arab wreckers, but the vessel was never permanently abandoned. Three steamers rendered valuable services to the vessel, and finally succeeded in getting her off the rocks and saving part of her cargo. The value of the vessel for the purposes of the action was taken to be 3750*l.*—The Court awarded 2000*l.* as salvage. (*See The Inca*, Swa. 370, 12 Moo. P. C. 189). **THE ERATO - - - - 163**

3. — Pilotage.] In an action for salvage it appeared that on March 20, about 11 A.M., the plaintiffs' fishing smack fell in with the defendants' vessel, which was shewing an English Jack flag in her rigging, in the North Sea, forty miles from Lowestoft. The crew of the vessel were suffering from frost-bite, the helmsman in consequence steering with one hand. They were also short of provisions. They told the master of the smack that they wished to be piloted to the nearest port, the vessel being at this time out of pilotage waters, and he agreed to take and took the vessel to Great Yarmouth:—*Held*, that even assuming that the signal exhibited by the defendants' vessel was ambiguous, the assistance rendered to her was in the circumstances a salvage service, and that the plaintiffs were entitled to remuneration accordingly. **THE AGLAIA - - - - 160**

4. — Queen's Ship—Right to Reward.] A vessel with a valuable cargo on board, struck on a reef on an uninhabited island in the Red Sea

SALVAGE—*continued.*

near the mainland; and the crew began to jettison part of the cargo, which they threw into shallow water. Armed Arabs then crossed over from the mainland and began to plunder the jettisoned cargo. A Queen's ship having come up, her commander anchored near the wrecked vessel, and sent a number of his crew to act as sentinels on the beach of the mainland, who were posted for about a mile along the beach, and were exposed to severe heat. Others of the crew were employed in discharging the cargo, working up to their waists in water in the hold, which was greatly fouled. They threw out the cargo and hauled it across the reef to the mainland, where it was collected by the sentinels and labourers. In an action of salvage by the commander and crew of the Queen's ship:—*Held*, that the services rendered by them being beyond the scope of their public duty were salvage services, and that they were entitled to remuneration accordingly. **THE CARGO EX ULYSSES** - - - - 205

SHIP—*Damage—Jetty in Tidal River—Vessel of Necessity grounding—Implied Representation by Wharfinger.*] The defendants, who were wharfingers, agreed with the plaintiff for a consideration to allow his vessel to discharge and load her cargo at their wharf, which abutted upon the River Thames. It was necessary in order that the vessel might be unloaded that she should be moored alongside a jetty of the defendants which ran into the river, and that she should take the ground with her cargo at the ebb of the tide. The vessel at the ebb of the tide sustained injury from the uneven nature of the ground. The bed of the river at the point where she took ground was vested in the Conservators, and the defendants had no control over it, but it was admitted that they had taken no steps to ascertain whether it was suitable for the vessel to ground upon:—*Held*, that there was an implied undertaking by the defendants that they had taken reasonable care to ascertain that the bottom of the river at the jetty was not in a condition to cause danger to the vessel, and that they were liable for the damage sustained by her. **THE MOORCOCK** 157

2. — *Demurrage—Admiralty Jurisdiction of County Court—32 & 33 Vict. c. 51, s. 2, sub-s. 1—“Agreement in relation to the use or hire of ship.”*] By the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 2, county courts having Admiralty jurisdiction are empowered to try causes “as to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship,” provided the amount claimed does not exceed 300*l.*—By charterparty between the plaintiffs (shipowners) and charterers, it was agreed that the plaintiffs' ship should load a full and complete cargo of coals from such colliery as charterers might direct; the vessel to be loaded in forty-eight hours; the loading to be on conditions of colliery guarantee annexed thereto, which owner agrees to accept, and settle with the colliery agent for payment of any demurrage which may become due, and the ship if not despatched within the stipulated time to lay five days on demurrage at the rate of 16*s.* 8*d.* per hour. By the guarantee

SHIP—*continued.*

referred to, the defendants, a colliery company, undertook to load the ship in forty-eight hours and to be liable for the usual “demurrage for each hour exceeded.”—An action having been brought in a county court by the plaintiffs against the defendants for demurrage for not loading the ship within the stipulated time:—*Held*, that the undertaking by the defendants to load the ship was not “an agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship,” within s. 2, and that the county court had no jurisdiction. **THE ZEUS** [188

— Restraint—Co-owners—Arrest of chartered ship—Sale—Liability of purchaser 42
See PRACTICE. 4.

— Sale of—Practice - - - 10
See PRACTICE. 10.

SHIPPING CASUALTY—*Rehearing—Merchant Shipping (Carriage of Grain) Act, 1880 (43 & 44 Vict. c. 43), s. 4, sub-s. (c)—Board of Trade Regulations, August, 1881—Cargoes—Two-deck Ship—Shifting-boards in lower Hold—Feeders.*] A ship having two decks and loaded with a cargo of barley in bulk at a port in the Mediterranean must, upon the proper construction of s. 4, sub-s. (c), of the Merchant Shipping (Carriage of Grain) Act, 1880, and the Board of Trade Regulations of August, 1881, be provided with shifting-boards in the lower hold.—By paragraph 4 (b) of these regulations—which directs that feeders shall be fitted to feed the grain carried in the between decks, such feeders to contain not less than 2 per cent. of the compartments they feed—it is intended that the feeders feeding the grain carried in the between decks, shall contain not less than 2 per cent. of the grain in the compartments in the between decks which they feed, and of the grain in the hold below which is fed by such compartments. **THE ROTHBURY** - 119

STATUTES:

9 & 10 Vict. c. 93 - - - 80
See PRACTICE. 6.

20 & 21 Vict. c. cxlvii. s. 86 - - 48
See WRECK.

24 Vict. c. 10, s. 4 - - - 82
See PRACTICE.

25 & 26 Vict. c. 63, s. 54 - - 125
See PRACTICE. 3.

32 & 33 Vict. c. 51, s. 2, sub-s. 1 - 188
See SHIP. 2.

36 & 37 Vict. c. 66, ss. 16, 24, sub-s. G - 105
See PRACTICE. 7.

43 & 44 Vict. c. 43, sub-s. (c) - - 119
See SHIPPING CASUALTY.

THAMES—Wreck—Thames Conservancy Act, 1857 - - - 48
See WRECK.

WHARFINGER—Vessel discharging cargo at wharf—Implied representation as to condition of bottom of river - 157
See SHIP.

WRECK—*Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), s. 86.*] In ascertaining the charges and expenses of weighing or raising a vessel under the Thames Conservancy Act, 1857, s. 86, the cost of a special apparatus provided by the Conservators for removing wrecks, and used on the particular occasion, may be taken into account; such cost comprising interest upon capital invested in the apparatus, repairs, a depreciation fund, and the insurance of the apparatus

WRECK—*continued.*

against risk. The charge for insurance of the apparatus cannot be estimated by reference to the tonnage of the wreck raised by it. Where it appears that the work in question could have been done more cheaply by a less expensive apparatus, the charges must be based on the lower rate. THE HARRINGTON - - 48

WRIT—Address—Foreign corporation - 8
See PRACTICE. 11.



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